LIBRARY
SUPREME COURT, U. S.

FILED.
JUN 12 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

..... Term, 196...

No. 238

TAX REVIEW BOARD OF PHILADELPHIA,
Petitioner,

Against

ESSO STANDARD DIVISION OF HUMBLE OIL AND REFINING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

LEVY ANDERSON,
First Deputy City Solicitor,
EDWARD G. BAUER, JR.,
City Solicitor,
Counsel for Petitioner.

1520 Municipal Services Bldg.
Philadelphia, Pa. 19107

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutory and Regulatory Provisions Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	15
Appendix A—Statutory and Regulatory Provisions	16
Appendix B—Tax Review Board Opinion	22
Appendix C—Opinion of the Court of Common Pleas of Philadelphia County	24
Appendix D—Opinion of the Supreme Court of Pennsylvania	32

TABLE OF AUTHORITIES

CASES:	PAGE
Awotin v. Atlas Bank, 295 U. S. 209 (1935)	6
Indian Motocycle Co. v. United States, 283 U. S. 570 (1931)	6, 7
Lash's Products Co. v. United States, 278 U. S. 175 (1929)	14

PAGE

Martin's Auto Trimming, Inc. v. Riddell, 283 F. 2d 503 (9th Cir. 1960) 9, 10

National Biscuit Co. v. Philadelphia, 374 Pa. 604 (1953 8

Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218 (1928) 7

People of the State of Ill. ex rel. Robert L. Gordon v. United States of America, 328 U. S. 8 (1946) 6, 7

Pure Oil Co. v. Alabama, 244 Ala. 258, 12 So. 2d 861, 148 A.L.R. 260 (1943) 6

Pure Oil Co. v. Joseph, 295 N. Y. 1039, 73 N. E. 2d 911 (1947) 6

Standard Oil Co. of Indiana v. State Tax Commissioner of State of North Dakota, 71 N. D. 146, 299 N. W. 447 (1941) 6

Standard Oil Co. v. State, 283 Mich., 85, 276 N. W. 908 (1937) 6

State Tax Commission v. Quebedeaux Chevrolet, 71 Ariz. 280, 226 P. 2d 549 (1951) 14

Sun Oil Co. v. Gross Income Tax Div., 238 Ind. 111, 149 N. E. 2d 115 (1958) 5, 6, 13, 14

Tele-Tone Radio Corp., etc. 133 F. Supp. 739 (N. J. 1955) 10

Undercofler v. Capital Automobile Co., 111 Ga. 709, 143 S. E. 2d 206 (Ct. of Appeals, Div. No. 3 1965) 9, 10

STATUTES AND ORDINANCES:

Philadelphia Code, §19-1001 8

Internal Revenue Code of 1939, §3412(a) 5

PAGE

Internal Revenue Code of 1954:
Section 4061 ..... 9, 16
Section 4081 ..... 5, 8, 9, 16
Section 4231 ..... 11, 16
Section 4251 ..... 11, 16
Section 4261 ..... 11, 16, 17
Section 4286 ..... 11, 17

REGULATIONS:

(a) Federal:
26 C. F. R. §42.4251-1(d) 11, 17
26 C. F. R. §48.4061(a)-1(c) 9, 17
26 C. F. R. §48.4081-1(c) 8, 9, 12, 17
26 C. F. R. §49.4261-10 ..... 11, 18
26 C. F. R. §49.4264(a)-1 ..... 11, 18
26 C. F. R. §49.4264(c)-1 11
26 C. F. R. §49.4286-1(c) 11
26 C. F. R. §148.1-6(c) 11, 18, 19
26 C. F. R. §301.7512-1 ..... 12, 19
26 C. F. R. §601.402(c)(1) 12
26 C. F. R. §601.403(c)(1) and (2) ... 12, 19, 20, 21
Revenue Ruling 63-80, IRB 1963-19, 32 C. B. 1963-1, p. 217 14

(b) City:
Mercantile License Tax Regulations §303(a)(4) . 8

OTHER AUTHORITY:

CCH Federal Excise Tax Reporter, §6261 14

SUPREME COURT OF THE UNITED STATES

Term, 196 .

No.

TAX REVIEW BOARD OF PHILADELPHIA,
Petitioner,

Against

ESSO STANDARD DIVISION OF HUMBLE OIL AND REFINING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on March 14, 1967, reversing a judgment in favor of the Petitioner.

OPINION BELOW.

The Opinion of the Supreme Court of Pennsylvania (Appendix D, App. p. 32) is reported in 424 Pa. 355 (1967).

The Opinion of the Court of Common Pleas of Philadelphia (Appendix C, App. p. 24) (R. 28a) is not reported.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania (Appendix D, App. p. 32) was dated and entered on March 14 (1967). The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

QUESTION PRESENTED.

Where a producer of gasoline separately lists in its invoices to its customers the Federal Manufacturer's Excise Tax imposed by Section 4081 of the Internal Revenue Code of 1954 (26 U. S. C. A. §4081) upon gasoline sold by the producer may such producer exclude from its gross receipts under the Mercantile License Tax of the City of Philadelphia the amount of such excise tax on the ground that the producer is only a collection agent for the United States under the Internal Revenue Code?

(Answered in the affirmative by the Supreme Court of Pennsylvania.)

STATUTORY AND REGULATORY PROVISIONS INVOLVED.

The pertinent provisions of the Statutes and Regulations of the United States are set forth in Appendix A, *infra*, page 16.

STATEMENT.

There is no dispute as to the facts. The Esso Standard Division of Humble Oil and Refining Company ("Humble"), a Delaware Corporation, is qualified to do business in the Commonwealth of Pennsylvania. It is engaged in the business of producing, refining, and transporting gasoline, lubricating oils, and other petroleum products and was a duly registered and bonded producer of gasoline under the Internal Revenue Code for the years in question.

When a sale is made by Humble, the purchaser receives an invoice which separately sets forth the products sold, gallonage of the products, the delivered price, the tax per gallon, the cost of each product and the total amount of the invoice. When Humble makes sales for export, for use on a vessel or aircraft, to a non-profit educational organization or to a state or local government it need not pay the tax. Farmers and other non-highway users may obtain a "refund" of the tax included in their sales price.

Humble on or before the 15th of the month, in accordance with the regulations of the Internal Revenue Service, pays over to the Federal Reserve Bank for the account of the United States Government the amount of the Federal manufacturers' excise tax on taxable sales of gasoline during the previous month, whether or not it collects the total sales price from its customers.

The Department of Collections of the City of Philadelphia made an additional assessment of $29,336.71 against Humble on the basis of an understatement of its gross receipts because Humble had failed to include in its total receipts for the years 1960 through 1962 that portion of the total sales price representing the Federal manufacturers' excise tax on gasoline sales.

Humble appealed the assessment to the Tax Review Board of the City of Philadelphia claiming it was collecting these Federal manufacturers' excise taxes as an agent of the Federal Government and hence these receipts were excludable from its gross receipts subject to the incidence of the mercantile license tax. The City took the position, before the Board, that the tax was on the producers or on the importer, as defined within the Revenue Code. At the hearing before the Board, the City stated the federal question involved in the following words: "The issue is, does the Federal Government consider this tax on the producer or do they consider it on the producer's purchaser?" (R. 9a). The Tax Review Board sustained the assessment, holding that the federal manufacturers' excise tax on gasoline is imposed directly on the producer, that they are part of the cost of goods sold and therefore are similar to the many other costs which go to determine the selling price. Upon appeal, the Court of Common Pleas of Philadelphia County, recognizing the federal question involved and accepting the City's position, affirmed the Tax Review Board's decision (Appendix C, p. 24) (R. 28a-29a), wherein it stated:

> "The sole issue involved is whether Esso [Humble] was acting as a collection agent of the Federal Government when it collected federal excise taxes from its customers and when it paid these taxes to the Federal Government. If, in fact, Esso was a collection agent, the excise taxes collected would be excluded from the gross receipts in computing the Philadelphia Mercantile License Tax. . . ."

* * * * * * * *

> "The City of Philadelphia, on the other hand, contends that the federal excise tax on gasoline collected by Esso [Humble] is a tax imposed upon Esso, the producer, that is not a 'user' tax, and that it, therefore, is properly excludable in Esso's gross receipts for it is a part of the cost of the products which are sold by the taxpayer".

Upon appeal to the Supreme Court of Pennsylvania, the same Federal question was raised by the City and recognized by the Court in its decision. However, that Court reversed the judgment of the Court of Common Pleas of Philadelphia and found in favor of the taxpayer.

REASONS FOR GRANTING THE WRIT.

The decision below is in basic conflict with the rationale of pertinent decisions of this Court and presents vital questions which have not been, but should be, decided by this Court. Those questions are of great importance to thousands of taxing authorities throughout the United States.

The decision below is in direct conflict with the most recent pronouncement by another State Supreme Court. *Sun Oil Co. v. Gross Income Tax Div.*, 238 Ind. 111, 149 N. E. 2d 115 (1958). Excluding the instant case, there are at least five (5) decisions by the highest State Courts interpreting the federal statutes and questions involved. The decisions all involve the intrepretation of Section 4081 of the Internal Revenue Code of 1954 (26 U. S. C. A. §4081) and its predecessor Section 3412 (a) of the 1939 Internal Revenue Code. There is no difference in the pertinent language in the two sections as these sections impose the tax on gasoline sold by the producer thereof. Three (3) State Courts have found that these Federal Statutes impose the incidence of the tax upon the producer making the sale.

Pure Oil Co. v. Alabama, 244 Ala. 258, 12 So. 2d 861, 148 A. L. R. 260 (1943); *Pure Oil Co. v. Joseph*, 295 N. Y. 1039, 73 N. E. 2d 911 (1947); *Sun Oil Co. v. Gross Income Tax Div., supra.* Two (2) State Courts, other than Pennsylvania, have found that the producer is a collection agent for the government and that the incidence of the tax is upon the producer's purchaser or the ultimate consumer. *Standard Oil Co. v. State*, 283 Mich. 85, 276 N. W. 908 (1937); *Standard Oil Co. of Indiana v. State Tax Commissioner of State of North Dakota*, 71 N. D. 146, 299 N. W. 447 (1941). These decisions do not specify upon whom the incidence of the tax is imposed, thereby leaving this important issue unanswered. The Pennsylvania Supreme Court decision indicates that the incidence is upon the ultimate consumer which would appear to be contrary to this Court's holding in *Indian Motocycle v. United States*, 283 U. S. 570 (1931). In discussing upon whom the Excise Tax is imposed this Court said at page 574:

> "We think it [the tax] is laid on the sale, and on that alone . . . Counsel for the Government base their contention on the requirement that the tax be paid by 'the manufacturer, producer, or importer'; but *we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production, or importation. . . .*" (Emphasis added.)

The question, upon whom does the federal statute impose the incidence of this tax, is a federal question, and is of vital importance to the multitude of taxing authorities throughout the United States. This Court has clearly held that a State Court's interpretation of a federal statute is a federal question which may be determined upon certiorari. *Awotin v. Atlas Bank*, 295 U. S. 209, 213 (1935). Furthermore, this Court has specifically recognized its right, if not a duty, to grant certiorari to resolve conflicts between several States in their interpretation of federal tax statutes. *People of the*

State of Ill. ex rel. Robert L. Gordon v. United States of America, 328 U. S. 8 (1946).

The decision below, in support of its holding, cites two (2) cases of This Court for the proposition that excise taxes are imposed upon the purchaser. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218 (1928) and *Indian Motocycle Co. v. United States*, 283 U. S. 570 (1931). It is submitted that these cases do not stand for the proposition for which they were cited in the Court below. These cases hold that where the economic burden of the tax was passed on to a sovereign government the tax was an infringement on the immunity of the federal government in the *Panhandle* case and as to a municipal government in the *Indian Motocycle* case, from taxation. There is no language in either of these cases which says that the incidence of the excise tax is upon the purchaser. This interpretation is strengthened by Justice Stone's dissent in the *Indian Motocycle* case wherein he states (at pp. 581 and 582):

> "In the Panhandle Oil Case it was held that this *shifting of the burden* of a state tax from seller to the buyer was sufficient to render the tax invalid where the buyer was an agency of the United States and it was assumed that the burden of the sales tax involved was so inevitably passed on to the buyer as to require this result.
>
> * * * * * * * *
>
> "Whatever factors determine whether the burden does in fact shift, I do not think it can be said that a tax paid by the seller in any given case necessarily burdens the purchaser either more or less because in form laid on the sale, as in the Panhandle Oil case, or upon transportation of goods sold f. o. b. destination, as in Wheeler Lumber Co. v. United States, 281 U. S. 572, 50 S. Ct. 419, 74 L. Ed. 1047, or on manufacture alone of articles intended for sale, see Cornell v. Coyne, 192 U. S. 418, 24 S. Ct. 383, 48 L. Ed. 504, or on both manufacture and sale." (Emphasis added.)

The Mercantile License Tax of the City of Philadelphia is contained in Section 19-1001 et seq. of the Philadelphia Code. This tax has been held to be an excise tax on the privilege of doing business in Philadelphia measured by gross receipts. *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 612-613 (1953). Section 303 (a) (4) of the Mercantile License Tax Regulations sets forth the exclusions from the gross receipts in ascertaining the tax base. It provides:

> "The following receipts shall be excluded from gross receipts and shall be omitted from the tax base:
>
> "(4) taxes collected as agent for the United States of America . . . where the customer pays the tax."

Humble sought to have that part of its gross receipts representing the Federal manufacturers' excise tax excluded from its taxable gross receipts on the grounds that it collects these taxes as an agent for the United States of America, and, therefore, comes within the exclusion set forth in the mercantile license tax regulations. The answer to this issue depends solely upon whom the tax is imposed. If on Humble's customers, these sums are excludable, if upon Humble, they are not. In order to determine this basic issue we must examine the applicable parts of the Internal Revenue Code of 1954 and the Federal Tax Regulations, thereunder.

Section 4081 of the Internal Revenue Code of 1954 (26 U. S. C. A. §4081) provides:

> "(a) *In General*, There is hereby imposed on gasoline sold by the producer or importer thereof or by any producer of gasoline, a tax of four cents ($.04) per gallon."

Section 48.4081-1 (c) of the Treasury Regulations (26 C. F. R. §48.4081-1[c]) provides:

> "Liability for Tax. A tax imposed by §4081 is payable by the producer or importer making the sale of the gasoline."

It is a fundamental ruling of statutory construction that the intent of legislation is to be found in the statute itself. Where the words of the statute are plain it cannot be subtracted from or added to. It is respectfully submitted the meaning of the words of Section 4081 of the Internal Revenue Code are plain. That section imposed the tax on "gasoline sold by the *producer or importer thereof*. . . ." (Emphasis added.) Section 48.4081-1 (c) of the Treasury Regulations (supra) states that the tax is *"payable by the producer or importer making the sale"*. (Emphasis added.) This language is free and clear from all ambiguity. There is nothing in these words which would support the conclusion that the incidence of the gasoline Federal manufacturers' excise tax is upon the purchaser as the Court below concluded. Nor is there any language therein that would indicate that the producer is a collection agent for the Federal Government.

The City's interpretation is strengthened by examining other Federal excise taxes in pari materia. The Federal manufacturers' excise tax on automotive and related items, 26 U. S. C. A. §4061,[1] imposes a tax on articles "sold by the manufacturer, producer or importer . . ." The incidence of this tax has been interpreted to fall upon the manufacturer. *Martin's Auto Trimming, Inc. v. Riddell*, 283 F. 2d 503 (9th Cir. 1960).

In *Undercofler v. Capital Automobile Company*, 111 Ga. App. 709, 143 S. E. 2d 206 (Ct. of Appeals, Div. No. 3, 1965), it was held that the Federal manufacturers' excise tax upon automobiles "is an element of the cost of the property sold"

---

[1] §4061 "Imposition of Tax.

"(a) Automobiles. There is hereby imposed upon the following articles . . . sold by the manufacturer, producer or importer a tax equivalent to the specified percent of the price for which so sold: . . ."

§26 C. F. R. §48.4061 (a)-1 (c).

"(c) Liability for tax. The tax imposed by section 4061 (a) is payable by the manufacturer, producer or importer making the sale."

and is includible in "gross sales" and "sales prices" as defined in the sales and use tax act. That opinion in discussing the manufacturers' excise tax upon automobiles said at p. 210:

> *"The manufacturers' excise tax upon automobiles* (26 U. S. C. [I. R. C. 1954] §4061) *is a tax liability resting directly upon the manufacturer* (26 U. S. C. [I. R. C. 1954] §4061), *and amounts to an expense of his incidental to the sale or lease* (26 U. S. C. [I. R. C. 1954] §4217) *or the manufacturers' own use* (26 U. S. C. [I. R. C. 1954] §4218) *of the manufactured article;* it is not a tax liability either of the intermediate dealer or of the ultimate purchaser. See Martin's Auto Trimming, Inc. v. Riddell, 283 F. 2d 503 (9th Cir.). To the dealer it is an element of 'the cost of the property sold' within the meaning of the unambiguous language of Code Ann. §92.3403 a (E), and hence, to the purchaser, a part of the sales price, just as much so as the manufacturers' cost of raw materials and labor as elements figuring in the 'sales price' as defined by this Code section. See Consolidated Distributors, Inc. v. City of Atlanta, 193 Ga. 853, 856 (2), 20 S. E. 2d 421. *The manufacturers' excise tax, but for separate billing to avoid payment of the Georgia Sales tax pro tanto, has at the time of retail no separate identity as a tax. While this excise tax is in practical effect 'passed on' to the purchaser, first by an increase in the cost of the property to the dealer, then by an increase in the purchase price, yet this circumstance does not* shift legal liability for payment of the federal tax and does not *change the essential character of the tax, which is part and parcel of the sales price and not an extraneous addition to it."* (Emphasis supplied.)

In *In Re Teletone Radio Corp.* (U. S. D. C., D. N. J.) 133 F. Supp. 739 (1955), the United States sought to designate as a special fund in trust (26 U. S. C. A. §3661) monies allegedly collected by the debtor consisting of the Federal

manufacturers' excise tax which it had passed on to its customers and as to which the United States contended the debtor was a collection agent for the United States. In rejecting the claim of the United States the District Court ruled that the manufacturer's excise tax was laid upon the manufacturer alone even though it may have included the amount of the tax in its total sale price to its customers.

Where the agency relationship has been created the language of the Internal Revenue Code and the Treasury Regulations has specifically set up this relationship. This is true of the Federal excise taxes on Transportation,[2] safe deposit boxes,[3] communications,[4] and cabarets.[5] The typical wording where this agency relationship is created may be found in the Federal excise taxes on communications which provides:

> "(a) In General.—
>
> (1) . . . there is hereby imposed on amounts paid for the following communications services a tax equal to the percent of the amount so paid specified in paragraph (2):
>
> Local Telephone Service
> Toll Telephone Service
> Teletypewriter Exchange Service
>
> *The taxes imposed by this section shall be paid by the person paying for the Services."* (Emphasis added.)

The Treasury Department in formulating its regulations as applicable to the communications Federal excise provides:

> *"Liability for a return of tax.* The taxes imposed by Section 4251 are payable by the person paying for the service and facilities furnished, and shall be paid to the person furnishing the services and facilities *who is re-*

---

[2] 26 U. S. C. A. §4261 (d); 26 C. F. R. §49.4261-10, 26 C. F. R. §49.4264 (a)-1, and 26 C. F. R. §49.4264 (c)-1.

[3] 26 U. S. C. A. §4286, 26 C. F. R. §49.4286-1 (c).

[4] 26 U. S. C. A. §4251, 26 C. F. R. §42.4251-1 (d).

[5] 26 U. S. C. A. §4231; 26 C. F. R. §148.1-6 (c).

quired to collect the tax and return and pay over the tax in accordance with the applicable provisions of the regulations . . ." (Emphasis supplied.)

The comparable section of the gasoline excise tax regulation, Section 48.4081-1 (c) supra, does not contain similar wording or any other words which would create an agency relationship, but on the contrary, specifically states that "the tax . . . is payable by the producer."

Section 301.7512 of the Treasury Regulations (26 C. F. R. §301.7512-1) entitled "Separate Accounting for Certain Collected Taxes" enumerates a number of taxes in which an agency relationship has been created. Included in this list are all the excise taxes where this relationship exists. The excise tax on petroleum products is not among those listed. The maxim of statutory construction, *expressio unius est exclusio alterius* requires the conclusion that Federal manufacturers' excise tax on gasoline is not among those which are to be collected from the customer.

Furthermore, the Treasury Regulations concerned with Internal Revenue Practice, Sections 601.402 (c) (1) and 601.403 (d) (1) and (2). (26 C. F. R. §601.402 (c) (1) and 26 C. F. R. §601.403 (c) (1) and (2)) in dealing with the procedure for the collection of excise taxes distinguishes between excise taxes which are paid by persons liable for the tax and those excise taxes which are required to be collected from a third party. The manufacturers' excise tax on gasoline is not among the taxes listed for collection from a third party. Therefore, it can be stated that there is no regulation of the Treasury Department to support Humble's interpretation of the Internal Revenue Code that it is an agent for the United States in collecting the Federal manufacturers' excise tax on gasoline.

Moreover, Congress in classifying its excise taxes placed this tax under the general classification of "Manufacturers' Excise Taxes." If the tax is to be imposed upon the producer's purchasers, as petitioner contends, the tax would not have been placed under this classification but would

have been placed under the general classification of "Retailer's Excise Taxes" or under its own headings, as a number of the excise taxes are listed. However, Congress placed the gasoline excise tax with other excise taxes which are imposed upon the manufacturer. Therefore, it is submitted that the total invoice price which is received by Humble from its customers are includible in its taxable gross receipts.

The most recent appellate decision on point is *Sun Oil Co. v. Gross Income Tax Division*, 238 Ind. 111, 149 N. E. 2d 115 (1958), which resolved the identical issue involved herein. Indiana had a Gross Income Tax which permitted as a deduction from gross income, monies collected as an agent of the United States. There, as here, the sales invoices delivered to the buyers segregated and separately listed, the number of gallons sold, the sales price per gallon, the total sales prices and the amount of each tax imposed per gallon. The Court after reviewing all the facts and most of the arguments presented herein by Humble, ruled that the incidence of Federal manufacturers' excise tax on gasoline was upon the producer and not his customer and, therefore, the monies charged as taxes were part of Sun Oil's Gross Income. That court declared:

> "We fail to find anything within the Federal statutes, or regulations made pursuant thereto on producers' excise tax on gasoline and oils which in any way compels or authorizes the conclusion that the Federal tax was a fund to be collected from the buyers, and to be paid to the Federal government. The statutes do not make the producer a collecting agent or fiduciary for the Government. If that were the case the fund would be held upon trust, and should be kept or deposited in a separate account. The statute does not put the tax upon the retail purchaser, but it is laid upon the producer or manufacturer. Regulation Sec. 314.3 makes a sale on credit taxable. 'In the case of a sale on credit, it is immaterial whether or not the purchase price is

actually collected.' The general scope of the sections on the gasoline tax, the oil tax and the bond required clearly indicates the tax to be paid by the manufacturer or producer. Whether he passes the amount on to the buyer is immaterial in determining the liability for the tax."

In the leading case of *Lash's Products Co. v. United States,* 278 U. S. 175, 73 L. Ed. 251 (1929), it was ruled that the 10% tax on soft drinks sold by the manufacturer in containers should be calculated on the total sales price including the 10% tax and not on the amount of the sales price less the tax. The same result was reached in *State Tax Commission v. Quebedeaux Chevrolet,* 71 Ariz. 280, 226 P. 2d 549 (1951), where it was ruled that the annual privilege tax of the State of Arizona against gross proceeds of sales included all sums received by a retailer of personalty even though he separately billed to his customers the privilege tax he passed on to them and segregated amounts received.

The Treasury Department has ruled that when the gasoline is delivered to a wholesale distributor on a consignment basis, the consignor-producer remains liable for the Federal manufacturers' excise tax. The consignee is the conduit through which the producer transacts the sale and thus, the responsibility for reporting and paying the manufacturers' excise tax remains with the producer. The reasoning behind this opinion is that it is the sale which created the liability not the production. However, it is the producer upon whom the incidence of the tax is imposed. Revenue Ruling 63-80, C. B. 1963-1, page 217 (CCH Federal Excise Tax Reporter, paragraph 6261).

In the instant case the government looked solely to Humble for the money. Humble is not required by any section of the Internal Revenue Code or Treasury Regulations to pass on this tax. Similarly, there are no requirements that the tax be separately stated on the invoice and recorded separately in the books. The reasons for Humble's so doing

may be numerous, however, none are pertinent to the issue herein. Hence the only conclusion possible is that the incidence of the tax is upon Humble.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Court should issue its Writ of Certiorari to review the decision below.

Respectfully submitted,

LEVY ANDERSON,
First Deputy City Solicitor,
EDWARD G. BAUER, JR.,
City Solicitor,
Counsel for Petitioner, Tax Review Board.

APPENDIX A.

STATUTORY AND REGULATORY PROVISIONS.

26 U. S. C. §4061

"... There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold: ..."

26 U. S. C. §4081

". . . There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

26 U. S. C. §4231

". . . A tax of 1 cent for each 10 cents or major fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription. . . . The tax imposed under this paragraph shall be paid by the person paying for such admission."

26 U. S. C. §4251

". . . There is hereby imposed on amounts paid for the communication services or facilities enumerated in the following table a tax equal to the percent of the amount so paid as is specified in such table: . . . The taxes imposed by this section shall be paid by the person paying for the services or facilities."

26 U. S. C. §4261

". . . There is hereby imposed upon the amount paid within the United States for the transportation of persons by rail, motor vehicle, water, or air within or without the

United States a tax equal to 10 percent of the amount so paid. . . .

(d) *By whom paid.*—The taxes imposed by this section shall be paid by the person making the payment subject to the tax."

26 U. S. C. §4286

". . . There is hereby imposed a tax equivalent to 10 percent of the amount collected for the use of any safe deposit box. Such tax shall be paid by the person paying for the use of the safe deposit box."

26 C. F. R. §42.4251-1(d) (Communications)

"§42.4251-1 *Imposition and rates of tax*

(d) *Liability for, and return of, tax.*

The taxes imposed by section 4251 are payable by the person paying for the services and facilities furnished, and shall be paid to the person furnishing the services and facilities who is required to collect the tax and return and pay over the tax in accordance with the applicable provisions of the regulations contained in Subparts H and I of this part."

26 C. F. R. §48.4061(a)-1(c) (Motor Vehicles, Tires, Tubes, Tread Rubber, Gasoline and Lubricating Oil)

"§48.4061(a)-1 *Imposition of tax*

(c) *Liability for tax.* The tax imposed by section 4061(a) is payable by the manufacturer, producer, or importer making the sale."

26 C. F. R. §48.4081-1(c) (Gasoline)

"§48.4081-1 *Imposition and rates of tax*

(c) Liability for tax. The tax imposed by section 4081 is payable by the producer or importer making the sale of the gasoline. As amended T. D. 6574, Oct. 11, 1961, 26 F. R. 9575."

26 C. F. R. §49.4261-10 (Refunds and other Administrative Provisions of Special Application to facilities and Services Taxes)

"§49.4261-10 *By whom paid*

The tax imposed by section 4261 is payable by the person making the taxable payment for transportation or for seats, berths, etc., and is collectible by the person receiving such payment. See section 4264 (a) and (c) for special rules relating to payment and collection of tax."

26 C. F. R. §49.4264(a)-1 (Facilities and Services)

"§49.4264(a)-1 *Duty to collect the tax; payments made outside the United States*

Where payment is made outside the United States for a prepaid order, exchange order, or similar order for transportation which begins and ends in the United States or for seating or sleeping accommodations in connection therewith, the person furnishing the initial transportation pursuant to such order shall collect all the tax applicable to such transportation or accommodations. See section 4291 and the regulations thereunder for cases where persons receiving payment must collect the tax."

26 C. F. R. §148.1-6(c) (Monthly Returns and Payment of Excise Taxes)

"§148.1-6 *Reporting and payment of cabaret tax on amounts received by concessionaires*

(c) *Duties of Proprietor—(1) Collection of tax from concessionaire.*

The proprietor shall collect from each concessionaire within the time prescribed in paragraph (b) (1) of this section for payment of tax by the concessionaire to the proprietor, the amount of the tax which is payable by the concessionaire to the proprietor pursuant to

section 4231(6) and this section. Any amount of tax so collected by the proprietor is a special fund in trust for the United States."

26 C. F. R. §301.7512-1 (Miscellaneous Provisions)

"§301.7512-1 *Separate accounting for certain collected taxes*

"(2) . . . (i) The taxes imposed by section 4231(1), (2), and (3) on amounts paid for admissions, and the tax imposed by section 4231(6) on amounts paid for admission, refreshment, service or merchandise at any roof garden, cabaret, or other similar place, to the extent that such tax on amounts paid on or after January 1, 1959, is required to be collected by the proprietor of the roof garden, cabaret, or similar place from a concessionaire in such estblishment,

(ii) The taxes imposed by section 4241 on amounts paid as club dues,

(iii) The taxes imposed by section 4251 on amounts paid for communications services or facilities,

(iv) The tax imposed by section 4261 on amounts paid for transportation of persons and the tax imposed by section 4271 on amounts paid before August 1, 1958, for the transportation of property, and

(v) The tax imposed by section 4286 on amounts collected for the use of safe deposit boxes."

26 C. F. R. §601.403(c)(1) and (2) (Provisions Special to Certain Employment and Excise Taxes)

"§601.403 *Miscellaneous excise taxes collected by return*

(c) *Collection of tax*—(1) *Imposed taxes.*

The tax on charges made by cabarets, roof gardens and other similar places, the taxes on admission charges in excess of the established price, the tax on the first domestic processing of certain vegetable oils, and the tax on the manufacture of sugar, are collected in the

same manner as manufacturers' and retailers' sales taxes. See §601.402. The tax on the use of highway motor vehicles, tax on wages, the tax on hydraulic mining, and the tax on circulation other than of national banks are also collected by means of returns. The returns of the tax on wagers are required to be filed monthly; returns of tax on hydraulic mining and on the use of highway motor vehicles are required to be filed annually; and the returns of the tax on circulation are required to be filed on June 1 and December 1 of each calendar year.

(2) *Collected taxes.* The other miscellaneous excise taxes referred to in this section are imposed on the person making the payment for the admission, telephone, transportation or other service involved. These taxes are required to be collected by the theatre, telephone company, railroad, or other person receiving the payment. All taxes collected in this manner are held by the collecting agent in trust for the United States until deposited in accordance with the Depositary Receipt procedure or paid over to the district director. The collecting agencies are required to file returns and the tax is payable without notice from the district director, at the time fixed for filing returns. If the person from whom the tax is required to be collected refuses to pay it or, if for any reason it is impossible for the collecting agency to collect the tax from such person, the collecting agency is required to report to the district director for the district in which its returns are required to be filed the name and address of such person, the nature of the service or facility rendered, and amount paid therefor, and the date on which paid. Upon receipt of this information the district director will proceed against the person to whom the facilities were provided or the services rendered to assert the amount of tax due, affording such person the same informal con-

ference, protest and appellate rights as are available to other excise taxpayers. In addition, when a field or office audit of a collecting agency's records, or of a taxpayer's records discloses that the collecting agency failed during prior reporting periods to collect taxes due, the district director may assert such taxes directly against the persons to whom the facilities were provided or the services rendered, whether or not the collecting agency had attempted collection or the persons liable for the tax had refused payment thereof."

APPENDIX B.

CITY OF PHILADELPHIA

Tax Review Board

April 13, 1965

Opinion No. 65-2 Docket No. 40.02-J616

Esso Standard Division of
Humble Oil and Refining Company

This is a petition for review of deficiency assessments of Philadelphia Mercantile License Tax for the years 1960, 1961 and 1962 aggregating $29,336.71 plus interest and penalties. The facts and figures are undisputed; the sole question is one of law.

Petitioner is a producer of gasoline and other petroleum products subject to liability for the federal excise tax "imposed on gasoline sold by the producer . . ." by Section 4081 of the Internal Revenue Code of 1954. In invoicing its sales, Petitioner separately shows a charge for this Federal tax except when the purchaser is exempt. Petitioner, during the years in question excluded sums collected from its customers, as so invoiced and paid by Petitioner to the Federal government, from its gross receipts in computing its Philadelphia Mercantile License Tax. Petitioner contends that this was proper because Petitioner was, in effect, simply acting as agent for the government in collecting the tax which was not really part of its sales price nor part of its gross receipts. In so doing Petitioner points to Section 303 (a) (4) of the City's applicable Regulations which provides for the exclusion from the tax base of "Taxes collected as agent for the United States of America", listing among examples of such taxes "b. Federal excise taxes on

jewelry, furs and fur articles, toilet preparations and luggage." Petitioner argues that its position in respect of this tax is the equivalent in all respects of the position of the retailer with regard to the excise taxes on jewelry and furs.

The City on the other hand has made the assessments in question on the theory that the amount invoiced as Federal excise taxes are part of the sales price even though separately invoiced and, therefore, properly includible in gross receipts for purposes of computing Mercantile License Tax.

Thus, the sole question is whether this Federal tax is one imposed on the producer and passed along to its customer by including it in the price regardless of the method of invoicing or whether the producer acts as agent for the Federal government in collecting the tax from its customer and paying it over to the government. This issue is one of first impression in this Commonwealth but has been decided in a number of other jurisdictions with a resultant split of authority. The most recent case cited to us and the one in which the facts appear most closely to resemble those here under consideration reaches the conclusion that the producer is the taxpayer and not the agent of the government for collection from its customer. *Sun Oil Company v. Gross Income Tax Division of the State of Indiana*, 238 Inc. 111, 148 N. E. 2d 115 (1958). We believe this to be the better view despite certain aspects of the tax and its administration which create an aura of agency.

Accordingly, the petition is denied. However, we find that Petitioner acted in good faith, without negligence and with no intent to defraud and could reasonably have been misled by the City's own regulation, Section 303 (a) (4) described above. Therefore, all penalties and interest are hereby abated provided balance due is paid in accordance with the terms of new bill to be issued by the Department of Collections, or, if an appeal from this decision is taken, within thirty days after final determination by the Court and the rendering of a new statement reflecting the Court's decision.

APPENDIX C.

OPINION OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY.

Alexander, J. October 7, 1966

This is an appeal by the Esso Standard Division of Humble Oil from a decision of the Tax Review Board of the City of Philadelphia.

The facts involved in this case are undisputed. Esso is a producer of gasoline and petroleum products. Pursuant to Section 4081 of the Internal Revenue Code of 1954, Esso, as a "producer", is required to pay a federal excise tax amounting to four cents a gallon, on every gallon of gas it sells.

During the assessment period involved in this case (1960 to 1962), Esso collected $9,778,902 in federal excise taxes upon sales to its customers, which it paid over to the Federal Government. Esso excluded this sum from its gross receipts in computing its Philadelphia Mercantile License Tax for the years in question.

The Department of Collections of the City of Philadelphia assessed additional Mercantile License Taxes amounting to $29,336.71, against Esso contending that Esso should have included the $9,778,902 which it paid in federal excise taxes in its "gross receipts" for the purpose of computing its liability under the Philadelphia Mercantile License Tax.

Esso refused to pay the additional assessment and, thereafter, filed an appeal to the Tax Review Board which sustained the City of Philadelphia's position of assessing the additional taxes in question.

The sole issue involved is whether Esso was acting as a collection agent of the Federal Government when it collected federal excise taxes from its customers and when it

paid these taxes to the Federal Government. If, in fact, Esso was a collection agent, the excise taxes collected would be excluded from the gross receipts in computing the Philadelphia Mercantile License Tax.

The Philadelphia Mercantile License Tax Ordinance imposes a tax upon the "gross receipts" of businesses operating in the city. Section 19-1001 of the Ordinance defines Gross Receipts as follows:

> "(5) *Gross Receipts.* Cash, credits and property of any kind or nature received in, attributable to, Philadelphia from any business or by reason of any sale made or service rendered or commercial or business transaction occurring in Philadelphia."

Section 303 (a) (4) of the Mercantile License Tax Regulations, provides that, "taxes collected as agent for the United States of America . . . where the agent pays the tax", are not includible in the tax base, and accordingly, are not taxable.

In support of its argument that it is a collection agent, Esso contends that: "(1) the gasoline excise taxes which it collects for the federal government are not its receipts and may not be taxed by the city as such: (2) federal gasoline taxes are imposed by statute, not upon Esso, but upon sales of gasoline; (3) sales taxes are by nature collected by sellers but borne by buyers, and (4) the Congress of the United States has characterized federal gasoline excise taxes as 'user taxes . . . assessed (upon) users of the highway.'"

The City of Philadelphia, on the other hand, contends that the federal excise tax on gasoline collected by Esso is a tax imposed upon Esso, the producer, that is not a "user" tax, and that it therefore, is properly includable in Esso's gross receipts, for it is a part of the cost of the products which are sold by the taxpayer.

This position was adopted by the Tax Review Board in affirming the imposition of the tax in question.

Whether or not the Federal excise tax is imposed upon the sales or upon the production of gasoline and oil, is not controlling in this case. What is controlling is upon whom the tax is imposed—the producer or its customers. Under Section 48.4081-1 (c) (26 CFR 48.4081-1(c)) of the Internal Revenue Regulations, taxes imposed under Section 4081 of the Internal Revenue Code are "payable by the producer or importer making the sales of the gasoline."

Esso contends that this regulation along with the applicable provisions of the Internal Revenue Code, should be interpreted as meaning that the "producer or importer making the sale" is a collecting agent for the United States and that the incidence of the tax falls upon its purchasing customers. Whenever a collecting agency relationship has been created, the Federal regulations determining liability for payment of excise taxes have always specifically created the relationship. Federal Tax Regulation 26 CFR Section 42.4251-1 (d), relating to excise taxes imposed upon communications products, is illustrative:

> "The taxes imposed by Section 4251 are payable by the person paying for the service and facilities furnished, and shall be paid to the person furnishing the services and facilities who is required to collect the tax and return and pay over the tax in accordance with the applicable provisions of the regulations . . ."

Esso argues it is "immaterial" that the Internal Revenue Code and Regulations do not expressly provide that federal gasoline taxes are to be borne by the consumer. It contends that the Regulations and the legislative history of the statute demonstrate that Congress intended the incidence of tax to fall upon the consumer, and that it is, therefore, a collecting agent.

This position is not supported by Section 301.7512 of the Regulations, entitled, "Separate Accounting for Certain Collected Taxes." This section includes a list of all the excise taxes in which tax collection agency relationships have been

created. The excise tax on gasoline and oil is not included. Accordingly, one must conclude that Congress did not intend that producers of gasoline and oil were to be "collecting agents."

Furthermore, the legislative history of the amendment to Section 4082 of the Internal Revenue Code illustrates that Congress intended the incidence of Federal excise taxes on gasoline and lubricating oils to fall upon the producers and importers making the sales of those products.

In the House of Representatives' Report pertaining to Section 4082 of the Internal Revenue Code, the following is stated in regard to the incidence of the tax:

> "Under present law the Federal tax on gasoline is imposed on the producer or importer of the gasoline and is payable by him shortly after he makes the sale. This means that the refinery or major oil company on sales directly to a service station does not have to pay the tax until after its sale to a retailer, . . .
>
> "In addition, since the gasoline tax is based upon the volume of gasoline the wholesale distributor purchases, he not only pays tax on the volume of gasoline he resells but also on the gasoline he loses through evaporation and spillage . . . (t)his is (a) . . . payment which his integrated competitor does not have to make, since he pays tax only on the gasoline he sells and not on his losses through evaporation and spillage . . .
>
> "To remove these discriminations, this provision provides that a wholesale distributor is to be treated as a producer; that is, the wholesale distributor will be able to buy gasoline on a tax-free basis and pay the tax at the time he makes his sale."[1]

It appears that the above explanation clearly indicates that Congress did not intend to make producers of gasoline and oil collection agents of the United States.

---

[1] House of Representatives Report #1120, 86 Congress, 1st Session, 1959, C. B. 1959-2, 871-879.

In classifying the excise tax on gasoline and lubricating oils, Congress placed the tax under the general heading of, "Manufacturer's Excise Taxes." If the incidence of the tax was intended to be upon the purchaser, Congress would undoubtedly have placed the tax under the general classification of "Retailer's Excise Taxes", or under a separate heading of its own.[2] Since Congress did not elect to do this, the position of the City in this case is supported thereby.

Esso contends that due to the size of the tax, it is inconceivable that Congress intended the tax to fall upon the producer. The wholesale price of standard grade gasoline is .153¢ per gallon. The excise tax imposed upon a gallon of standard grade gasoline is .11¢ (.04¢ for the Federal tax, and .07¢ for the Pennsylvania tax).

Although the Federal and State excise taxes on gasoline equal 71% of the wholesale price of the product, such is not controlling because the amount of a tax has no bearing upon whom the incidence of the tax is imposed.

Under the Code, the purchaser of gasoline and oil has no duty to pay the excise tax. The producer or importer making sales is solely responsible to pay the tax. The fact that the economic burden of the tax is ultimately passed on to the purchaser, is irrelevant *Dow Jones Co. v. United States,* 128 F. Supp. 748 (Ct. of Cl.; 1955), in which the court stated in regard to a Federal excise tax on business machines:

> ". . . He will, if possible, add the amount of the tax to the selling price, and thus pass on the economic burden of the tax to the purchaser. But the purchaser is not liable for the tax, and is not the taxpayer. In Lash's Products Co. v. United States, 278 U. S. 175, 49 S. Ct. 100, 73 L. Ed. 251, Affirming 64 Ct. Cl. 252, the Court said:
>
> 'The phrase "pass the tax on" is inaccurate, as ob-

---

[2] Many taxes are separately classified.

viously the tax is laid and remains on the manufacturer and on him alone. * * *

The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all.' "

The taxpayer argues that the above case is not on point because the federal excise tax on business machines is measured by a percentage of the sales price of the machine and is therefore, "a kind of gross receipt tax on specific commodities." Also, Esso argues, that the tax involved in the present case is measured by the number of gallons sold and because it is not "measured by units other than dollars of receipts," it is a sales or user tax. This argument falls because it is clear that an excise tax which is not measured by the sales price of the commodity sold can be a tax which is imposed on the manufacturer.

In *F. & M. Schaefer Brewing Co. v. Gerosa,* 14 N. Y. 2d 25, 197 N. E. 2d 291 (1964), the court held the taxpayer had to include in its gross receipts the $9.00 per barrel Federal excise tax on beer, under the gross receipts tax of New York City.

The New York City tax is similar to the Philadelphia Mercantile License Tax, both being "privilege" taxes. The excise taxes on beer and gasoline are not imposed until a sale is made. Both taxes are measured upon a unit basis, rather than upon a percentage of the sales price.

The New York Court of Appeals stated as follows in the *F. & M. Schaefer Brewing Co.* case, supra, in regard to the incidence of the New York City tax:

"It is our view that federal excise taxes incurred by the petitioner in the production and sale of its beer constitute a 'cost of manufacturing and selling' such beer. . . . The federal excise tax on beer, . . . is a cost not only traceable but directly attributable to each barrel of beer brewed and sold by the petitioner. . . . As such, not only is it as much a cost of those activities as is the

amount paid for the ingredients of the beer, the barrels in which it is shipped and the labor employed in the manufacture. . . ."

Esso also argues that because Section 4221 of the Internal Revenue Code provides that no tax shall be imposed upon sales for export, or upon sales for use as a supply on a vessel or aircraft, or upon sales to a non-profit educational organization, or to a state or local government, that it would be inconsistent to make these exemptions from the tax if the incidence of the tax is, not in fact, borne by the seller.

This contention is similar to that made in regard to the refunds to which farmers and other consumers of gasoline for certain non-highway uses are entitled under the Internal Revenue Code. Esso argues that no refunds would be allowed if the incidence of the tax falls upon the producer.

The basic reason for allowing the refunds and exemptions referred to is, that it is understood that the seller will pass the tax on to his purchaser by including the tax in his sales price.

Because of the refunds, Esso argues that if the incidence of the tax falls upon the producer, "it is clear that (1) the tax as imposed upon producers is unconstitutional and/or (2) that the refunds as granted to certain users are unconstitutional. For obviously there is a deprivation of substantive due process when property is taken from one person and given to another regardless of whether this is done directly by confiscation or indirectly under the guise of taxation."

Clearly, the existence of the refund and exemption provisions are grounded in fact, in that they only apply in regard to gasoline and oil, to vehicles which are not normally used upon the public highways, such as farm vehicles. Moreover, it is begging the question to argue that the refunds amount to a taking of property from one person and giving it to another. The refund transactions are

clearly separate and apart from the incidence of the tax as it applies to this case.

Accordingly, the appeal of Esso Standard Division of the Humble Oil and Refining Company is dismissed, and the decision of the Tax Review Board of the City of Philadelphia is sustained.

RAYMOND PACE ALEXANDER,
J.

APPENDIX D.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Filed: March 14, 1967.

EAGEN, J.

Section 4081 of the United States Internal Revenue Code of 1954 (26 U. S. C. A. §4081) provides:

> "(a) There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."[1]

Liability for payment of the tax is imposed upon the producer who makes the sale.[2]

The appellant, Esso Standard Division of Humble Oil and Refining Company (Humble) is the producer of gasoline and other petroleum products. Humble adds the amount of the above tax to the sales price of the gasoline it charges each purchaser, and the latter receives at the time of the sale an invoice separately listing thereon the charge for the product and the tax.

The question posed by this appeal is, whether that portion of the total sales price (on sales in Philadelphia), which Humble charges the purchaser and later returns to the United States government in payment of the tax, is part of its "gross receipts" for mercantile tax purposes, under the pertinent provisions of the Code of the City of Philadelphia.

---

[1] Sales for certain specified uses are exempt from the tax. Also a refund to the purchaser is provided for if the gasoline is used on a farm for farm purposes.

[2] Section 48.4081-1 (c) of the Treasury Regulations (26 C. F. R. §4081-1-[c]).

The Department of Collection of the City of Philadelphia ruled that such sums should be included in the computation of Humble's "gross receipts" for mercantile tax purposes for the years 1960 through 1962. On appeal the Court of Common Pleas of Philadelphia County sustained the decision of the department and entered judgment accordingly. We granted certiorari under Rule 68½, and now reverse.

The Mercantile License Tax of Philadelphia's Code[3] is an excise tax on the privilege of doing business in that city, and is measured by the gross receipts of the business. See, *National Biscuit Company v. Philadelphia,* 374 Pa. 604, 98 A. 2d 182 (1953). However, the Mercantile Tax Regulations[4] exclude from "gross receipts," in ascertaining the tax base, "taxes collected as agent for the United States government, Commonwealth of Pennsylvania or City of Philadelphia, where the ultimate customer pays the tax.

The City of Philadelphia admits, as it must, that if Humble is a mere collector of the tax involved, such sums must be excluded in the computation of its taxable gross receipts. However, it argues earnestly and ably that under the code, supra, the tax is imposed solely on the producer, not the purchaser, and Humble cannot be deemed to be a collector of taxes imposed upon itself.

We agree that if the tax involved is truly a manufacturer's or producer's tax, the city's position is correct. We further agree that the mere fact the tax is passed on to the purchaser does not determine upon whom the tax is imposed. The economic burden of all taxes incident to the sale of merchandise is traditionally so passed on as part of the "overhead." In the same category is the circumstance of the purchaser receiving an invoice, separately listing the tax involved. Invoices or bookkeeping cannot change the nature or incidence of the tax. However, it is our con-

---

[3] Section 19-1001 et seq.

[4] Section 303(a)(4).

sidered conclusion that the operative word in Section 4081 of the Internal Revenue Code, supra, is "sold," and the particular levy is a sales tax pure and simple. Further, the nature, the size of the tax in relation to the wholesale price of the product,[5] and the purpose thereof compel the conclusion, that it is not and never was intended to be imposed upon the producer, but rather upon the purchaser, the user and prime beneficiary of the facilities that the tax pays for and makes possible. The producer's responsibility is limited to seeing that it is paid; hence realistically and logically it is nothing more than a collector thereof.

The revenue collected as a result of the tax does not go into the general treasury. Instead, it is placed in a special fund and is used solely to defray the cost of the federal highway system. It was designed to charge the motorists, who use the highways, with the cost thereof. It has been recognized and characterized by both the President and Congress of the United States as a "user tax."[6] Moreover, this conclusion is fortified by Section 6420(a) of the code itself, which provides for a refund *to the purchaser* if the gasoline is used on a farm for farm purposes.

Our ruling is supported by analogous federal court decisions. See, *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218 (1928); *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931). See also, *Standard Oil Co. v. State*, 283 Mich. 85, 276 N. W. 908 (1937); *Standard Oil Co. of Indiana v. State Tax Commission of North Dakota*, 71 N. D. 146, 299 N. W. 447 (1941); and, *Esso Standard Oil Co. v. City of Danville*, 45 C. L. O. 358 (Corp. Court of Danville, Va., 1950). It is also in line with a multitude of our own decisions:

---

[5] The federal tax is equal to 26% of the wholesale price.

[6] See, President's Message to Congress, May 17, 1965. Also the report of the House Ways and Means Committee on H. B. 8371, 89th Congress, First Session (1965) at 1070-71.

"It is fundamental that taxing statutes and ordinances must be strictly construed and if there is any reasonable doubt as to the meaning intended, the doubt must be resolved in favor of the taxpayer and against the taxing authority: (citing cases)."

Don Allen Chevrolet Co. v. Pittsburgh, 414 Pa. 429, 433, 200 A. 2d 388 (1964). See also, *Tax Review Board v. Green,* 409 Pa. 448, 187 A. 2d 572 (1963).

Judgment reversed.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 11 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 238

TAX REVIEW BOARD OF PHILADELPHIA,
Petitioner,

v.

ESSO STANDARD DIVISION OF HUMBLE OIL AND REFINING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION

PARK B. DILKS, JR.
2107 The Fidelity Building
123 South Broad Street
Philadelphia, Pa. 19109
Attorney for Respondent.

MORGAN, LEWIS & BOCKIUS
Of Counsel.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION	2
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. No Federally Created Right, Privilege or Immunity is Here Involved as Would Confer Certiorari Jurisdiction Under 28 U.S.C. § 1257(3); Nor is There Present Any "Federal Question of Substance" Which Requires Resolution For "Special And Important Reasons" Under Rule 19	9
A. The matter involves the application of a local taxing ordinance and regulation thereunder; federal revenue and collection procedures are completely unaffected by the State Court's decision	9
B. The cases cited by the City demonstrate the City's inability to distinguish between the application by a state court of federal law on the one hand and the application of state law on the other	15
C. There is no conflict among the holdings of state court decisions in the area; and even if there were such a conflict, there is no	

PAGE

federal policy which favors, much less requires, uniformity in the exercise by the sovereign states of their taxing power 16

D. The holding of the Pennsylvania Supreme Court is completely in accord with certain decisions of this Court which were in fact cited by the State Supreme Court; the City's argument to the contrary is erroneous 19

II. The Unanimous Decision of the Supreme Court of Pennsylvania correctly held that, within the intendment of the Philadelphia Mercantile License Tax Ordinance and Municipal Regulation, Federal Excise Taxes which are added to the Sales Price of gasoline and related products are "User Taxes" borne by the purchasers of such products and do not increase the Mercantile License Tax Base of the producer who collects and remits such excise taxes to the Federal Government 24

A. The City ordinance and regulation 24

B. Considerations of Pennsylvania Law 28

C. Considerations of General Law 29

D. The federal statute, its Congressional characterization, and its interpretation by federal agencies 32

E. Summary of Humble's arguments to the Pennsylvania Supreme Court 40

CONCLUSION 42

Table of Citations

CASES:

	PAGE
Alabama *v.* King & Boozer, 314 U.S. 1 (1941)	22
Arbuckle's Estate, 324 Pa. 501, 188 A. 758 (1936)	28
Awotin *v.* Atlas Bank, 295 U.S. 209 (1935)	15
Commonwealth *v.* Allied Building Credits, Inc., 385 Pa. 370, 376, 123 A.2d 686 (1956)	28
Don Allen Chevrolet Co. *v.* Pittsburgh, 414 Pa. 429, 200 A.2d 388 (1964)	28
Eugene Theater Co. *et al. v.* City of Eugene *et al.*, 194 Oregon 603, 243 P.2d 1060 (1952)	30
Indian Motocycle Co. *v.* United States, 283 U.S. 570 (1931)	20
Lefferts *et. al. v.* City of Philadelphia, 88 Pa. D. & C. 345 (C.P. Phila. 1953)	28
Panhandle Oil Company *v.* Mississippi *ex rel.* Knox, 277 U.S. 218 (1928)	20
People of the State of Ill. *ex rel.* Robert L. Gordon *v.* United States, 328 U.S. 8 (1946)	15
Pickering Estate, 410 Pa. 638, 190 A.2d 132 (1963)	28
Pure Oil Co. *v.* Alabama, 244 Ala. 258, 12 So. 2d 861 (1943)	17
Pure Oil Co. *v.* Joseph, 295 N.Y. 1039, 73 N.E. 2d 911 (1947)	17

PAGE

Sun Oil Company *v.* Gross Income Tax Division of the State of Indiana, 238 Ind. 111, 149 N.E.2d 115 (1958) 17

Tax Review Board *v.* Green, 409 Pa. 448, 187 A.2d 572 (1963) 28

CONSTITUTION OF PENNSYLVANIA:

ARTICLE IX, SECTION 1. 27

STATUTES AND ORDINANCES:

Code of General Ordinances of the City of Philadelphia, ch. 19-1000 25

Excise Tax Reduction Act of 1965, § 802; 26 U.S.C.A. §§ 4082(b)(2), 4101 (Supp. 1966) 37

Federal-Aid Highway Act of 1956, Act of June 29, 1956, Tit. II, ch. 462, § 209, 70 Stat. 397, *as amended by* Act of June 21, 1962, Tit. VIII, § 809 (c), 79 Stat. 144, 168; 23 U.S.C.A. § 120, Historical Note 33

Internal Revenue Code of 1954:

Section 162 39

Section 164 39

Section 4001 26

Section 4011 26

Section 4081 .....2, 26, 32

Section 4082(b)(2) 37

PAGE

Section 4101 ..... 36, 37
Section 4221 34
Section 5001 33
Section 5701 33
Section 6420(a) 35
Section 6421(b) 36
Section 6421(f) 36

Revenue Act of 1924, ch. 234, § 600, 43 Stat. 322 23

Statutory Construction Act, Act of May 28, 1937, P.L. 1019; 46 PURD. PA. STAT. ANN. § 558 (1952) 28

Tax Act of 1963 for Education, Act of May 29, 1963, P.L. 49, § 2(e)(1); 72 PURD. PA. STAT. ANN. § 3403-2(e)(1) (Supp. 1966) 38

REGULATIONS:

(a) Federal:

26 C.F.R. § 48.4001-1 (d) (1967) 26
26 C.F.R. § 48.4011-1 (f) (1967) 26
26 C.F.R. § 48.4081-1 (c) (1967) 26
26 C.F.R. § 48.4101-1 (c) (1) (1967) 37
29 C.F.R. § 779.257-.266 (1967); 1 CCH WAGES AND HOURS 24,105.257-.266 39

(b) State:

Regulation 303(a)(4), 3 CCH PA. ST. TAX REP. 168-846 25

REPORT:

PAGE

Report of the House Ways and Means Committee on H. R. 8371, 89th Cong., 1st Sess. (1965), at 1070-71 34

OTHER AUTHORITIES:

51 AM. JUR., *Taxation*, § 1277 (1944) 31

Internal Revenue Service Publication No. 308, 6-61 (CCH FED. EXCISE TAX REP. 1336-01).. 35

Johnson, *Excise Tax Reductions and Consumption Expenditures*, TAXES 395 *et seq.* (1965) 29

Rev. Rul. 56-361, 1956-2, CUM. BULL. 794 38

6 U. S. CODE CONG. AND AD. NEWS 890 (1965).. 33

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged), G. & C. Merriam Co. (1963) 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967. No. 238

TAX REVIEW BOARD OF PHILADELPHIA,
Petitioner,

v.

ESSO STANDARD DIVISION OF HUMBLE OIL AND REFINING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania (Appendix D to Petition, p. 32) is reported in 424 Pa. 355, 227 A.2d 657 (1967).

The Opinion of the Court of Common Pleas of Philadelphia County (Appendix C to Petition, p. 24; R. 28a) is not reported.

JURISDICTION

Petitioner claims jurisdiction of this Court exists under 28 U.S.C. § 1257(3). Respondent disputes the claimed jurisdiction, the sole issue in the case being the proper construction of a municipal tax ordinance.

QUESTION

Where no federal revenue or collection procedure is involved and no "federal question" is presented, should this Court grant certiorari in order to render an advisory opinion on a question of state law by reviewing a unanimous final judgment of the Pennsylvania Supreme Court which construed a municipal taxing ordinance and regulation thereunder in such manner as to exclude from "gross receipts" under such ordinance the federal gasoline excise taxes collected by a producer of gasoline from purchasers thereof and remitted to the United States?

STATEMENT

Respondent (hereinafter "Humble") is a producer of gasoline and other petroleum products. As such, it collects, accounts for and pays over to the federal government certain excise taxes, principally the excise tax imposed on the sale of gasoline by Section 4081 of the Internal Revenue Code of 1954, which provides in material part as follows:

> "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

Humble *paid* Philadelphia mercantile license taxes on its receipts from gasoline and other products. It *did not pay* mercantile license taxes on federal

excise taxes which it collected. During the period covered by the municipal assessment (1960, 1961 and 1962) Humble collected from its customers and paid over to the federal government $9,778,902 in federal excise taxes. In respect of such $9,778,902 in federal excise taxes, the Department of Collections of the City of Philadelphia assessed against Humble additional mercantile license taxes in the amount of $29,336.71. In response to such assessment Humble timely filed a petition for a review in the Tax Review Board of Philadelphia (R. 3a), and at a hearing before that Board on December 6, 1963, Humble introduced evidence concerning procedures applicable to the collection and remission of federal excise taxes imposed on sales of gasoline and other petroleum products (R. 4a *et seq.*).

The testimony showed that such taxes are separately listed by Humble on invoices directed to such of its customers as are taxable (Exhibit P-1, R. 22a), that certain users of gasoline and other petroleum products are not taxable (R. 15a; Exhibit P-2, R. 22a), that nontaxable users must provide Humble with exemption certificates or register with their local District Directors of Internal Revenue (R. 15a), and that farmers and other non-highway users from whom excise taxes must be collected by Humble in the first instance may obtain refunds of such taxes from their District Directors (R. 15a, 17a).

The testimony further showed that Humble posts bond as required by law to cover its liability for the

collection of federal excise taxes (R. 18a), that at the end of each month Humble pays over amounts collected to depositary banks and obtains depositary receipts from Federal Reserve Banks (R. 18a), and that at the end of each quarter Humble files an excise tax return and submits depositary receipts with such return as evidence of the transmittal of the taxes collected (R. 18a).

On April 13, 1965 the Tax Review Board (hereinafter "City") denied the petition for review (Opinion No. 65-2; CCH PA. ST. TAX REPORTER 200-535; App. B to Petition, p. 22; R. 23a), and an appeal was duly taken to the Court of Common Pleas of Philadelphia County on May 3, 1965 (R. 1a, 25a).

Argument was heard by the Court of Common Pleas on March 14, 1966, and on April 28, 1966 the Court dismissed the appeal (R. 1a, 27a). The Court's opinion in support of the dismissal was filed October 7, 1966 (App. C to Petition, p. 24; R. 28a).

On June 24, 1966 an appeal was allowed by the Supreme Court of Pennsylvania, which on March 14, 1967 filed its opinion and order, unanimously reversing the judgment of the Court of Common Pleas (App. D to Petition, p. 32).

The City filed its petition for writ of certiorari in this Court on June 12, 1967.

SUMMARY OF ARGUMENT

The City ordinance imposes a 3 mill gross receipts tax upon persons engaged in business in the City. The City regulation provides that the gross receipts tax base shall not include excise taxes such as, "but not limited to," the federal excise taxes imposed on sales of jewelry and furs. These jewelry and fur taxes are not, for City tax purposes, materially distinguishable from the federal gasoline excise tax. It follows that, under the City's regulation, federal gasoline tax collections may not be included in the City tax base. Recognizing this fact at the hearing, the City sought to repudiate its own regulation (R. 10a).

Considering the ambiguity of the City's position regarding its regulation, as well as the Pennsylvania doctrine that Pennsylvania taxing statutes and ordinances must be strictly construed with all doubts resolved in favor of the taxpayer, it was not surprising that the Pennsylvania Supreme Court unanimously endorsed Humble's contention that its liability for City gross receipts taxes should be measured by its receipts from sales of gasoline and should not be inflated to include its federal gasoline excise tax collections.

Obviously, the only question for decision before the Pennsylvania Supreme Court concerned the application of a municipal taxing ordinance and a regulation promulgated thereunder. These matters are of no interest to this Court, which has never attempted to

supervise the local tax affairs of the nation's tens of thousands of municipalities. The Court not only lacks jurisdiction, it lacks competence in this field as well; for it cannot possibly be conversant with the myriad considerations of state and local law which guide state courts to their decisions.

It is true that in deciding the instant case, the Pennsylvania Supreme Court cited the President and Congress for the proposition that the federal gasoline excise tax is a "user tax." The Pennsylvania Court also referred to the exemption and refund provisions of the federal law in concluding that, *for purposes of applying the municipal ordinance and regulation,* the federal tax should be treated as a sales tax and should not be added to the City tax base.

But the City errs in supposing that such comments by the State Court concerning a federal statute raise a "federal question," much less one which is "of substance" and which requires resolution for "special and important reasons" under Rule 19. The City errs because the State Court's remarks concerning the federal statute relate only to that Court's interpretation and application of state and local law. The State Court's observations will not result in the payment of a penny less or a penny more of federal gasoline excise tax, and will not subject to or excuse from the operation of the federal tax anyone who was not covered or exempted before. Whether the State Court's remarks are correct for some *federal purpose* should be left, in the orderly process of our legal sys-

tem, to a future case in which a "federal question" can be squarely raised, apart from fundamental considerations of local law.

Furthermore, the presence in this case of such fundamental considerations of local law would render advisory any pronouncement by this Court; for such pronouncement could deal at best only with a peripheral issue (the characterization of the federal gasoline excise tax) and could not consider, much less bind the Pennsylvania Court in respect of the core issue, namely the application of the local tax. Nor, *a fortiori*, could such pronouncement bind the courts of other states which have similarly considered, for state and local tax purposes, the interplay of the federal gasoline excise tax with their particular taxes. Consequently, there are no "special and important reasons" for granting certiorari; in fact, there are "special and important reasons" why certiorari should *not* be granted.

The authorities cited by the City certainly do not support the City's argument for certiorari in the present case. They hold that certiorari may be granted where a federal statute has been applied by a state court in such manner as to deprive the petitioner of a title, right, privilege or immunity claimed under a federal statute. The City can claim no such deprivation here, since its rights and privileges arise solely under its ordinance and regulation, the reaches of which may be finally and definitively established only by the State Supreme Court.

The City errs in stating that the holding of the Pennsylvania Supreme Court in this case is not in accord with two cases decided by this Court which were cited by the State Court in support of its decision. In fact, all three cases—two in this Court and one in the State Court—reached the same general conclusion, albeit they considered different excise taxes for different purposes. That conclusion was that excise taxes, although often made payable to the taxing authority by a manufacturer or seller, are not in fact laid upon them but are sales taxes which they collect from their customers upon whom the real onus of the tax falls. This is all the more true of the federal gasoline excise tax in view of the format of the statute and the Congressional characterization.

Accordingly, it is submitted that the Pennsylvania Supreme Court, applying Pennsylvania law as well as properly treating the federal gasoline excise tax as a sales tax, correctly decided the application of the City tax and regulation to Humble's receipts. But even more important than the correctness of the State Court's decision is the fact that finality should be accorded to it because the question decided was one of local law, and there is no basis upon which review by this Court can or should be granted.

ARGUMENT

I. No Federally Created Right, Privilege or Immunity is Here Involved as Would Confer Certiorari Jurisdiction Under 28 U.S.C. § 1257(3); Nor is There Present Any "Federal Question of Substance" Which Requires Resolution For "Special And Important Reasons" Under Rule 19.

A. The matter involves the application of a local taxing ordinance and regulation thereunder; federal revenue and collection procedures are completely unaffected by the State Court's decision.

The City erroneously contends that certiorari jurisdiction exists in the present case by virtue of 28 U.S.C. § 1257(3). This provision empowers the Court to grant a writ of certiorari to review final judgments or decrees rendered by the highest court of a state in which a decision could be had, (a) where the validity of a treaty or statute of the United States is drawn in question, or (b) where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or (c) where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. In turn, this Court's Rule 19 provides in material part that the Court will not grant certiorari except where

there are "special and important reasons therefor" and the case involves "a federal question of substance."

It is evident at a glance that this case does not concern either the validity of a treaty or statute of the United States or the validity of a state statute. It is equally manifest that it does not involve a title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. Nor does it pose "a federal question of substance," much less one which requires resolution for "special and important reasons." On the contrary, the single issue in this case is one as to the correct interpretation of a municipal tax ordinance and an administrative regulation promulgated thereunder.

The facts are clear and undisputed. A 1952 Philadelphia ordinance imposes a 3 mill per dollar Mercantile License tax upon the gross receipts of persons engaged in business in Philadelphia.

A regulation issued pursuant to such Philadelphia ordinance provides that the gross receipts tax base shall not include federal, state or local excise taxes which are collected by the taxpayer and remitted to the taxing authority levying the excise tax.

At all times relevant, Humble paid the Philadelphia Mercantile License tax upon its receipts from sales of gasoline. However, in accordance with the Philadelphia regulation, Humble did not pay the Philadelphia Mercantile License tax upon amounts of

federal excise taxes which Humble collected from its customers and remitted to the federal government.

Starting in 1963, the City, despite its own regulation, sought to lay its Mercantile License tax upon Humble's federal tax collections in order to inflate Humble's local tax base by approximately 26%[1].

In its opinion, the Supreme Court of Pennsylvania stated:

> "The question posed by this appeal is, whether that portion of the total sales price (on sales in Philadelphia), which Humble charges the purchaser and later returns to the United States government in payment of the tax, *is part of its gross receipts for mercantile tax purposes, under the pertinent provisions of the Code of the City of Philadelphia.*" At 355. (Emphasis added.)

The Supreme Court of Pennsylvania decided this question of local law in Humble's favor. In doing so, the State Court cited the presumption applicable in Pennsylvania that taxing ordinances must be strictly construed. The State Court also made certain observations concerning the nature of the federal gasoline excise tax. The City objects to these observations in its attempt to have this Court review an adjudication by a State Court on a question of local law.

It should be stressed that, in the adjudication of this local law question, the decision of the State Court resulted in the payment of neither a penny more nor

---

[1] Exhibit P-1, R. 22a.

a *penny less of the federal gasoline excise tax, and no one was subjected to or excused from the operation of such federal tax who was not covered by or exempted from it before.*

The interpretation of the federal statute in the Pennsylvania courts was relevant only to the correct application of the Pennsylvania law. Regardless of how the Pennsylvania courts chose to interpret the federal statute—whether as urged by the City or as urged by Humble—the chosen construction could have had no effect upon the application of the federal statute, and no impairment of any right, title, privilege or immunity under that statute could have resulted; and since in fact the Pennsylvania Supreme Court interpreted the municipal ordinance and pertinent regulation thereunder in a manner which in no way affected, prejudiced or interfered with the collection or payment of the federal tax, but simply construed state law adopted in the exercise of the sovereign power to tax, no aspect of this Court's certiorari jurisdiction is properly invoked here.

The City confuses a case in which a state court *applies a federal taxing statute* in a manner which has an impact upon federal revenues and/or collection procedures, with a case in which a state court *applies a local taxing ordinance and regulation* in a manner which has no impact upon federal revenues and/or collection procedures. To the extent that a state court in the latter situation makes gratuitous observations concerning federal laws, such observations are merely

academic exercises and will not attract the jurisdiction of this Court, since what is being applied and what is being affected is local law, not federal law.

The City objects to the observations made by the Pennsylvania Supreme Court concerning the federal gasoline excise tax; these include references to (1) statements by the President and Congress that the federal tax is a "user tax," and (2) the fact that refunds of the federal tax are available to certain purchasers when the gasoline is used on a farm for farm purposes. These observations concerning the federal tax contributed to the conclusion reached by the State Court that, *for purposes of the application of the Philadelphia Mercantile License tax ordinance and regulations,* the federal gasoline excise tax was essentially a sales tax which should not be added to Humble's receipts from sales of the product in order to exaggerate Humble's local tax base. *This characterization of the federal gasoline excise tax as a sales tax was solely for the purpose of determining a question of state law, namely the measure of tax under a local ordinance. Whether such characterization might or might not be accurate for some federal purpose should be left in the orderly process of our legal system to a future case in which the question can be squarely raised apart from considerations of local law.*

What standing in this Court do the observations by the State Court concerning the federal gasoline excise tax give to the City? Obviously, this Court is not going to disagree with statements by the President and Congress that the federal excise tax is a "user

tax." Nor is this Court going to determine that there exists no right of refund for farmers when in fact the statute confers such a right. What is left, then, is simply the State Court's conclusion that, *for purposes of a local taxing ordinance and regulations,* Humble's federal excise tax collections should not themselves be taxed by the municipality. With such conclusion this Court has neither the interest nor the competence to disagree. It has no interest because the federal government has no stake in the tax imposed by the City ordinance, and the question involved is purely and simply one of local law. It has no competence because *this Court cannot possibly know what weight was given by the State Court to the state law presumption in favor of the narrow construction of local taxing ordinances; nor can this Court know what other considerations of local law may have led the State Court to its holding.*

Thus, the City is here asking this Court to "correct" either the State Court's observations concerning the federal tax (which observations are factually unassailable) or the State Court's conclusion that the local tax base should not comprehend Humble's federal tax collections (which conclusion has nothing to do with federal revenue and presents no "federal question").

Obviously, this Court may not compel the Commonwealth of Pennsylvania, through one of its political subdivisions, to impose a local tax upon Humble where the highest court in the State has

declined to impose such a local tax. Nor may this Court be asked to engage in the futile exercise of advising the State Court how this Court might have decided this question of state law had this Court been a state court. Manifestly, this case ended when the State Court handed down its decision on March 14, 1967; *and the City has no business here requesting an advisory opinion.*

B. *The cases cited by the City demonstrate the City's inability to distinguish between the application by a state court of federal law on the one hand and the application of state law on the other.*

The City, in urging that this Court assert jurisdiction, relies upon *Awotin* v. *Atlas Exchange Bank,* 295 U.S. 209 (1935) and *People of the State of Illinois ex rel. Robert L. Gordon* v. *United States of America,* 328 U.S. 8 (1946). However, in both cases this Court granted certiorari where state courts had adjudicated questions pertaining to rights, privileges or immunities under federal statutes.

In *Awotin,* petitioner purchased from respondent, a national bank, bonds issued by a third party. Respondent agreed to repurchase such bonds at maturity at par. The question was whether a federal statute applied to prohibit a national bank from making such a guarantee. This Court held that it did. Obviously, the question as so decided was purely a federal question. Such is not the present case where there are no federally conferred rights, privileges or immunities,

and where the opinions expressed by the State Court about the federal statute were only for purposes of applying a local ordinance.

In *Gordon,* the question (as stated by the Court at page 9) was whether "tax claims of the Federal Government against an insolvent taxpayer must be satisfied in full before the State of Illinois can recover amounts due as taxes under its Unemployment Compensation Act." This Court asserted jurisdiction and held for the United States, which was a party to the litigation. In *Gordon,* federal priorities and federal dollars were involved. This is not so in the instant case where the State Court's comments respecting the federal act were solely for purposes of applying a municipal tax, and where no federal statute, policy, fund or collection procedure has been in any way affected by the result in the State Court.

C. *There is no conflict among the holdings of state court decisions in the area; and even if there were such conflict, there is no federal policy which favors, much less requires, uniformity in the exercise by the sovereign states of their taxing power.*

The City's petition observes that a number of state courts have considered whether federal gasoline excise tax collections should be subject to state sales taxes, state gross receipts taxes, state gross income taxes and local gross receipts taxes. No two of these cases were decided upon identical state statutes and regulatory provisions. Nor, obviously, were they de-

cided in the context of identical state and local conditions. Two[2] of the three cases cited by the City as being in "conflict" with the instant case did not involve the construction of a provision which (as in the present case) expressly removed excise taxes from the state or local tax base. The other case[3] involved a state tax (rather than a local tax) on gross income (rather than gross receipts).

But beyond these technical distinctions which negate conflict, the real point is that, even if a conflict existed in the application by various state courts of numerous state and local taxes, such conflict, no matter how serious as to matters of local law, would not raise a "federal question of substance" for purposes of this Court's certiorari jurisdiction.

Quite properly this Court has never attempted to supervise the local tax affairs of the nation's tens of thousands of municipalities, especially since municipalities not only share derivatively in the sovereignty of their respective states, but are also often shielded even from the states themselves by provisions for home rule or similar autonomy. Wisdom inheres in this practice because of the diversity of local ordinances and local problems.

The decision below involves no federal issue which requires a departure from the Court's past practice

---

[2] *Pure Oil Co.* v. *Alabama*, 244 Ala. 258, 12 So. 2d 861 (1943); *Pure Oil Co.* v. *Joseph*, 295 N.Y. 1039, 73 N.E. 2d 911 (1947).

[3] *Sun Oil Co.* v. *Gross Income Tax Div.*, 238 Ind. 111, 149 N.E. 2d 115 (1958).

and a uniformity of determination at the expense of state statutes or decisions, and no strong federal policy would be carried out by assuring that each state law or city ordinance imposing a gross receipts tax, gross income tax or sales tax be subordinated to the strictures of a uniform definition regarding the incidence of federal gasoline excise tax.

Finally, there is the question whether the review sought by the City would in fact resolve the alleged conflict. What if the Court agreed with the City that, despite pronunciations by the President and Congress characterizing the federal gasoline excise tax as a "user tax," it was not in fact such a tax but was purely and simply a 26% gross receipts tax on the producer? It is questionable whether such a "victory" by the City would change the adjudications of those courts which have refused to mount their gross receipts taxes or sales taxes upon federal excise tax collections. Despite "clarification" by this Court, those jurisdictions would remain free in applying local law to resist so harsh a result as the pyramiding of gross receipts and sales taxes. Thus, as already noted, such a decision by this Court would be merely advisory, and then only as to the characterization of the federal tax, which is no more than a peripheral issue; for in every case the core issue involves the application of a state or local tax, and this core issue is beyond the jurisdiction and competence of the Court. Therefore, rather than render an academic dissertation on the general subject, it would certainly seem preferable for

this Court to await a justiciable controversy in which the point sought to be raised by the City is before the Court in a federal context, rather than intertwined with considerations of local law which could render this Court's decision pointless and futile.

We submit that what the City abhors as conflicts are merely various decisions of various sovereign jurisdictions concerning the application of different state and local taxes, that it is not this Court's function to oversee such taxes and render them uniform, and that a decision by this Court of the type sought by the City would be neither binding nor effective in bringing about the uniformity which the City purportedly desires.

D. *The holding of the Pennsylvania Supreme Court is completely in accord with certain decisions of this Court which were in fact cited by the State Supreme Court; the City's argument to the contrary is erroneous.*

Under Rule 19 it is necessary not only that "special and important reasons" exist for the granting of certiorari in respect of "a federal question of substance," but also that such federal question, as decided by the State Court, shall not have been "heretofore determined by this Court, or [shall have been decided by the State Court] in a way probably not in accord with applicable decisions of this Court."

We have already pointed out that, despite references to federal law, the question here is a local

question, not a federal question. We have also observed that, with tens of thousands of local taxing jurisdictions in this country, there are no "special and important reasons" for granting certiorari to review the application by a particular State Court of a specific local ordinance, since, due to different local provisions and conditions, any decision by this Court would be limited in its application to a single jurisdiction. Moreover, even as to such single jurisdiction, such decision as to a peripheral issue (the characterization of the federal gasoline excise tax) would be advisory at best, since this Court is not competent to decide the fundamental issue, namely the construction of a local ordinance and a regulation promulgated thereunder.

Thus, the City's arguments fail in respect of two of the three elements necessary to bottom the grant of certiorari. The City likewise fails to make out the third necessary element by an argument which attempts unsuccessfully to show that the Pennsylvania Supreme Court's decision is "probably not in accord with applicable decisions of this Court."

The two decisions of this Court, both of which were cited by the Pennsylvania Supreme Court in support of its opinion, which the City alleges are contrary to the very opinion which they are cited as supporting, are *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U.S. 218 (1928) and *Indian Motocycle Co.* v. *United States,* 283 U.S. 570 (1931). In those cases, this Court construed two excise taxes (neither of them the federal gasoline excise tax) and concluded

that they were sales taxes which, although payable by the seller, were collectible from the buyer who in fact bore the onus of the taxes. This fully accords with what the Pennsylvania Supreme Court held when it construed the City Mercantile License tax as inapplicable to Humble's federal gasoline excise tax collections.

Closer analysis of the City's argument reveals that it does not take exception, and cannot take exception, to the holding of the Pennsylvania Supreme Court as being inconsistent with *Panhandle* and *Indian Motocycle*. Instead, the City appears to object to what was, in the Pennsylvania Supreme Court case, merely dictum. By such dictum, the State Court, citing the President and Congress, expressed the view that the federal gasoline excise tax was a "user tax." This, says the City, is contrary to its reading of *Panhandle* and *Indian Motocycle* as imposing excise taxes upon "first sales." Of course, whether the federal gasoline excise tax is a user tax or is imposed upon first sales is of no consequence in the present litigation, since in either event it would be a sales tax in the view of the Pennsylvania Supreme Court for local gross receipts tax purposes; and in neither event for such purposes would it be part of Humble's gross receipts. The following review of *Panhandle* and *Indian Motocycle* will demonstrate that there is no discord between their holdings and the State Court holding in the present case.

In *Panhandle*, a state statute provided:

> "Any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of one cent ($.01) per gallon upon the sale of gasoline." At 220.

The plaintiff in *Panhandle* sold gasoline to the Coast Guard and a veterans hospital. The state claimed a tax on the sales. The plaintiff asserted that if the tax were directed at sales it was necessarily imposed upon the buyer; and since the buyer was the United States government, an unconstitutional burden resulted. The Court endorsed the plaintiff's argument on both counts. First the Court said:

> "To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale." At 222.

A tax on the sale is a tax on the buyer, said the Court, and:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the state." At 222.

Second, since the buyer was the United States, the Court held that the tax could not constitutionally be imposed. The second of these two holdings was subsequently overruled in *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941). However, it is not the second holding which here concerns us, but rather this Court's endorsement of the plaintiff's first argument that a tax

measured by gallons sold is in effect a tax upon the sale and therefore upon the buyer. This pronouncement remains the law today.

The same result was reached in *Indian Motocycle,* where the taxing shoe was on the other foot. There the plaintiff sold a motorcycle to the City of Westfield. Section 600 of the Revenue Act of 1924, (ch. 234, § 600, 43 Stat. 322) provided:

> "There shall be levied, assessed, collected, and paid, upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—
>
> (1) . . . motorcycles . . . three per centum"

Because of the immunity issue, this Court had again first to face the question on whom the tax was imposed. On this point the Court said at page 574:

> "We think it [the tax] is laid on the sale, and on that alone . . . Counsel for the government base their contention on the requirement that the tax be paid by 'the manufacturer, producer, or importer'; but *we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production, or importation. . . .*" (Emphasis added.)

The Court then addressed itself to the immunity question which, as in *Panhandle,* is of no interest to the present inquiry.

Accordingly, it is fair to say that, in cases involving "federal questions," this Court views taxes similar to the instant one as imposed upon buyers and not upon sellers, despite the fact that for convenience sake such taxes are collected and paid over by sellers.

Obviously, the holding of the Pennsylvania Supreme Court in the instant case involving a question of local law parallels the decisions of this Court involving questions of federal law.

II. The Unanimous Decision of the Supreme Court of Pennsylvania correctly held that, within the intendment of the Philadelphia Mercantile License Tax Ordinance and Municipal Regulation, Federal Excise Taxes which are added to the Sales Price of gasoline and related products are "User Taxes" borne by the purchasers of such products and do not increase the Mercantile License Tax Base of the producer who collects and remits such excise taxes to the Federal Government.

A. The City ordinance and regulation.

It would be inappropriate in a brief opposing certiorari, particularly where the jurisdictional contentions of the petitioner are so extremely tenuous, to recite at length the many points which were presented to the State Supreme Court in the briefs and oral arguments. Accordingly, in this section some of the points will merely be noted and summarized and others will be omitted entirely.

The Philadelphia Mercantile License Tax Ordinance (Code of General Ordinances of the City of Philadelphia, ch. 19-1000) is imposed at the rate of 3 mills upon .

> "cash, credits and property of any kind or nature received in, or attributable to, Philadelphia from any business or by reason of any sale made or service rendered or commercial or business transaction occurring in Philadelphia . . . ."

Regulation 303(a)(4) (3 CCH PA. STATE TAX REPORTER 168-846) provides that the following taxes shall not be part of the tax base:

> "taxes collected as agent for the United States of America, Commonwealth of Pennsylvania or City of Philadelphia, where the customer or ultimate consumer pays the tax. *Such taxes shall include but not be limited to:*
>
> a. Federal taxes on admissions and dues
> b. Federal excise taxes on jewelry, furs and fur articles, toilet preparations and luggage
> c. Federal tax on transportation of property
> d. Federal tax on safe deposit boxes
> e. Pennsylvania liquid fuels tax
> f. City of Philadelphia amusement tax." (Emphasis added.)

We note first that, by reason of the italicized words, the enumerated taxes do not constitute a complete list of those which the City agrees are outside

the tax base. Thus the Regulation recognizes that other excise taxes in addition to the enumerated taxes are not includible in the base. Among the enumerated taxes are those applicable to jewelry and fur. Placed side by side the applicable sections of the Internal Revenue Code and the appropriate federal regulations are materially identical for jewelry and fur (enumerated) and for gasoline (not enumerated):

Jewelry Tax

Sec. 4001. "There is hereby imposed upon [certain] articles sold at retail a tax equivalent to 10 percent of the price for which so sold.

Regs. Sec. 48.4001-1(d). *Liability for tax.* The tax is payable by the person who sells at retail any article subject to tax. . . ."

Fur Tax

Sec. 4011. "There is hereby imposed upon [certain] articles sold at retail a tax equivalent to 10 percent of the price for which so sold.

Regs. Sec. 48.4011-1(f). *Liability for tax.* The tax is payable by the person who sells at retail any article subject to tax. . . ."

Gasoline Tax

Sec. 4081. "There is hereby imposed on gasoline sold by the producer . . . a tax of 4 cents per gallon.

Regs. Sec. 48.4081-1(c). *Liability for tax.* The tax . . . is payable by the producer . . . making the sale of the gasoline."

In short, all three of the above taxes are federal excise taxes; all three are *imposed on the sale* of certain commodities and all three are "payable" by the seller, whether manufacturer or retailer. The conclusion is irrestible that federal gasoline taxes are no more a part of a seller's mercantile license tax base than are federal jewelry and fur taxes. Faced with this dilemma, the City took the position at the hearing that its own regulation was in error (R. 10a)! The City's attempted disavowal of its own regulation is certainly the best proof of its application here. Apparently, the Pennsylvania Supreme Court chose not to accept the City's disavowal.

As already noted, the federal gasoline excise tax of 4 cents per gallon is equal to 26% of the wholesale cost of the product itself (Exhibit P-1, R. 22a), and it is interesting that of the ten excise taxes listed by the City's regulation as illustrative of taxes not included in the tax base, all but one (the Pennsylvania liquid fuels tax) are less in relation to the cost of the commodity than are federal excise taxes on gasoline and other petroleum products. To permit the omission from the tax base of lesser excise taxes while requiring the inclusion of greater excise taxes is arbitrary, inequitable, illegal and violative of the requirement contained in Article IX, Section 1 of the Constitution of Pennsylvania that "all taxes shall be uniform. . . ."

B. *Considerations of Pennsylvania Law.*

It is axiomatic in the Commonwealth of Pennsylvania that state and local taxing statutes and ordinances must be strictly construed against the taxing authorities and favorably to the taxpayer. Statutory Construction Act, Act of May 28, 1937, P. L. 1019, 46 PURD. PA. STAT. ANN. § 558 (1952). The burden is on the proponents of the tax to prove coverage, *Arbuckle's Estate,* 324 Pa. 501, 505 (1936); no tax may be levied in the absence of clear and unmistakable language imposing it, *Commonwealth* v. *Allied Building Credits, Inc.,* 385 Pa. 370, 376 (1956); and all doubts must be resolved in favor of the taxpayer, *Tax Review Board* v. *Green,* 409 Pa. 448, 454 (1963), *Pickering Estate,* 410 Pa. 638, 648 (1963), *Don Allen Chevrolet Co.* v. *Pittsburgh,* 414 Pa. 429, 433 (1964).

In addition, it should be borne in mind that the Philadelphia Mercantile License tax has been held to be an especially "onerous tax." *Lefferts, et al.* v. *City of Philadelphia,* 88 Pa. D. & C. 345, 350 (C. P. Phila. 1953). In cases involving this tax the courts will apply an even more stringent test than is employed in dealing with less burdensome taxes. In *Lefferts* (a case concerning the application of the Philadelphia Mercantile License tax) the court stated:

> ". . . the courts will use an entirely different standard in adjudicating a gross income tax, since such a tax is one burdening every transaction entered into, whether the transaction is

profitable or not and is not merely a tax on property that constitutes the profits of an enterprise." At 355-56.

Obviously, the standards which the Pennsylvania courts apply in determining the reach of a tax such as the City's Mercantile License tax are extremely stringent. It was natural, therefore, that the City would encounter resistance from the Pennsylvania Supreme Court in the City's attempt to add insult to injury by applying its local gross receipts tax to federal gasoline excise taxes which are enormous,[4] burdensome to collect, and regressive in their effect upon sales of gasoline.[5] *Indeed, the ambiguity of the City's position, coupled with the City's suggestion that its own regulation was erroneous, would have been enough, considering the burdens imposed upon local taxing authorities seeking to apply "onerous" gross receipts taxes in Pennsylvania, to have turned the tide in Humble's favor.*

C. *Considerations of General Law.*

It is recognized that gross receipts taxes by definition allow for no relief from income taxes, capital stock taxes, franchise taxes and even from other gross receipts taxes. But excise taxes of the instant type are fundamentally different in nature from those taxes which constitute costs of doing business and are

[4] They amounted to $2,618,000,000 in 1964. Johnson, *Excise Tax Reductions and Consumption Expenditures,* TAXES, 395 *et seq.* (1965).

[5] *Id.*

measured by profit, net worth or receipts. Excise taxes are essentially sales taxes on specific commodities. As such they are not part of the price of goods sold, but are a separate, distinct and additional charge imposed by law upon the transfer of property in a particular commodity. Such taxes are borne by buyers and are merely collected and remitted by sellers. Their nature and generally their size prevent their being absorbed by sellers and treated simply as costs to sellers of doing business.

In *Eugene Theater Co. et al.* v. *City of Eugene et al.*, 194 Oregon 603, 243 P.2d 1060 (1952), the court characterized excise taxes as follows:

> ". . . an excise is 'something cut off from the price paid on a sale of goods, as a contribution to the support of the government'. Buckstaff Bath House Co. *v.* McKinley, 198 Ark. 91, 127 S.W.2d 802, 806; Shanks *v.* Kentucky Independent Oil Co., 225 Ky. 308, 8 S.W.2d 383; 26 RCL, Taxation, 34, § 18. An admissions or sales tax is *not paid by the person who operates the business. He simply collects it from his patron or customer and later delivers it to the taxing agency. Thus it is the patron or customer who actually pays taxes of the type.* The 'take home' money of the operator of the business is not thereby reduced. . . ." At 1072. (Emphasis added.)

In the *Eugene* case the court had before it a tax "measured and determined by computing three per cent (3%) upon the total of the admission charges,

less all other taxes, collected by the licensee." The question was whether such tax was an occupation tax, which the municipality had the authority to levy, or an excise tax, which it did not have the authority to levy. The municipality argued (as does the City in the present case) that it was not an excise tax, since it did not contain a specific requirement "that the tax imposed be collected from the purchaser." The court rejected this argument and held that the tax was an excise tax, and that such a tax by its nature is collected by the seller, that it "never becomes the property of the [seller]," and that "the right and ownership of the [taxing authority] attaches immediately." At 1073.

Gasoline is a favorite commodity upon which excise taxes are imposed by a variety of taxing authorities.

> "It is a common and entirely lawful arrangement for the state to impose an excise or use tax on motor fuel used or otherwise disposed of within the state and collect the tax, not from the user through its own tax collection officers, but *from the dealer or distributor, who is in effect made the agent of the state for that purpose. He is, however, a collector of taxes rather than a taxpayer. . . .*" 51 AM. JUR. *Taxation* § 1277 (1944). (Emphasis added.)

The City blinds itself not only to these considerations of general law, but also to the economics of the situation. In Pennsylvania the wholesale price of stand-

ard grade gasoline is .153 cents per gallon, and the applicable excise taxes are .11 cents per gallon (Exhibit P-1, R. 22a). Thus, excise taxes on gasoline are equal to 71% of the cost of the product itself. The Pennsylvania tax of 7 cents per gallon is equal to 45%of the cost of the product; and, as already noted, the federal tax of 4 cents per gallon is equal to 26% of the cost. Can the City seriously contend that taxes of such magnitude are merely costs to gasoline producers of doing business?[6] If, as a matter of economics, the Pennsylvania sales tax of 5%, which is small when compared with gasoline excise taxes, should be (and is) borne by buyers of taxable goods and is not added to the Mercantile License tax base, then a *fortiori* gasoline excise taxes, which are many times larger than the Pennsylvania sales tax, must in any realistic appraisal of the matter be so borne.

D. *The federal statute, its Congressional characterization and its interpretation by federal agencies.*

As already quoted, the federal gasoline excise tax levied by Section 4081 of the Internal Revenue Code of 1954 provides in material part as follows:

> "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ a gallon."

[6] Effective September 30, 1959, the Federal gasoline excise tax was increased from 3 cents to 4 cents per gallon. Under the City's theory, this change would result automatically in increasing Humble's mercantile tax liability by approximately 6%, despite the fact that Humble's real receipts from the sale of gasoline remained unchanged.

It should be noted that the operative word here is "sold," not manufactured or produced. By comparison, certain other federal excise taxes are specifically imposed upon manufacture and production.[7] Accordingly, the federal gasoline excise tax is a sales tax on a specific commodity.

The revenue raised by the federal gasoline excise tax does not go into the general treasury. Instead it goes into a special trust fund and is used to defray the cost of the federal highway program.[8] There can be no doubt that the tax was designed to be imposed upon motorists who purchase gasoline and is so imposed in order to provide such taxpayers with highways.

(1) PRONOUNCEMENTS OF THE PRESIDENT AND CONGRESS. In fact, the President of the United States in his May 17, 1965 message to Congress concerning excise tax reform stated:

> "*Users* of highways come closer to *reimbursing* the federal government for its transportation investment than any other group."[9] (Emphasis added.)

---

[7] Section 5701 of the Internal Revenue Code provided:

> "On tobacco, manufactured in or imported into the United States there shall be imposed. . . ."

Section 5001 of the Internal Revenue Code provides:

> "There is hereby imposed on all distilled spirits in bond or produced in or imported into the United States. . . ."

[8] Federal-Aid Highway Act of 1956, Act of June 29, 1956, Tit. II, ch. 462, § 209, 70 Stat. 397, *as amended by* Act of June 21, 1962, Tit. VIII, § 809 (c), 79 Stat. 144, 168, 23 U.S.C.A. § 120 Historical Note.

[9] 6 U. S. CODE CONG. & AD. NEWS 890, June 20, 1965.

Even more to the point, Congress has characterized gasoline excise taxes as being *assessed on users in proportion to their use of the highway:*

> *"Taxes such as those on gasoline . . . are user taxes. They serve to assess to users* of, and, therefore, the primary beneficiaries of, certain Government facilities and programs a part of the cost to the taxpaying public of providing the facilities. For example, those who use the public highways benefit from the Government's contribution to highway construction. *A tax on gasoline taxes users* of the highways in rough proportion to their use of service."[10] (Emphasis added.)

Certainly the Congressional characterization of a federal tax is controlling and may not be impugned by the City.

(2) EXEMPTIONS FOR PARTICULAR USERS. The federal gasoline tax exempts certain users from its application. Section 4221 of the Internal Revenue Code of 1954 provides that no such tax shall be imposed upon sales "for export," or "for use by the purchaser as supplies for vessels or aircraft," or "to a State or local government," or "to a non-profit educational organization." If, as the City argues, the taxes in question are upon the *seller* it would make no sense to exempt certain *buyers* from their application.

(3) REFUNDS FOR PARTICULAR USERS. It would make even less sense to provide for the payment of

[10] Report of the House Ways and Means Committee on H. R. 8371, 89th Cong., 1st Sess. (1965), at 1070-71.

refunds to certain users if, as the City contends, the taxes in question are laid upon the producer. Yet this is precisely what the Code does. Section 6420 (a) states:

> "[If] gasoline is used on a farm for farming purposes, the Secretary . . . shall pay . . . to the ultimate purchaser of such gasoline the amount determined by multiplying—
>
> (1) the number of gallons so used, by
>
> (2) the rate of tax on gasoline under Section 4081 which applied on the date he purchased such gasoline."

Internal Revenue Service publication No. 308, 6-61 (CCH Federal Excise Tax Rep. 1336.01) states:

> ***"FARMERS GAS TAX REFUND"***
>
> *Who may claim a refund.* The owner, tenant or operator of a farm who buys gasoline for use on a farm.
>
> * * * *
>
> ***REFUND OF FEDERAL EXCISE TAX ON GASOLINE USED ON A FARM FOR FARMING PURPOSES***
>
> To get a refund of Federal gasoline tax you must file a claim on Form 2240. When you purchase the gasoline, *the price you pay includes the Federal gasoline tax, and you may claim a refund* of the tax on any gasoline which is used on a farm for farming purposes." (Emphasis added.)

It could not be clearer that what the farmer receives is a *refund* of the federal gasoline excise tax which *he has paid* measured by the number of gallons he has purchased multiplied by the tax rate in effect at the time of the purchase. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged), G. & C. Merriam Co., 1963, defines *refund* in material part as follows:

> "to give or put back . . . to return (money) in restitution, repayment. . . ."

The word "refund" forecloses the City's argument that the taxes in question are imposed upon and borne by the seller. The word refund presupposes that such taxes have been paid by the buyer and that they are being restored to the buyer. Taxes cannot be "refunded" to someone who never paid them.

In addition to total refunds, partial refunds are directed by I.R.C. Section 6421 (b) for local transit systems. Section 6421 (f) provides that the refunds allowed shall be treated "as if such payments constituted refunds of *overpayments* of the tax so imposed." (Emphasis added.) Obviously for there to have been an overpayment of tax, there must have been a *payment* by the buyer of the tax in the first place.

(4) THE BOND REQUIREMENT. Section 4101 provides that a seller must register and post bond. It would be extraordinary to require a taxpayer to secure by the bond of a third party the taxpayer's

obligation to pay his own taxes. On the other hand, it is perfectly normal to require that a person handling or collecting the money of another post bond to secure the collection, remission and accounting for such funds. Section 48.4101-1(c)(1) of the Regulations provides in part:

> "Such bond shall be conditioned that the principal shall not engage in any attempt, by himself or by collusion with others, to defraud the United States of any tax under Section 4081 or 4091; that he shall render truly and completely all returns. . . ."

The language used in the bond bespeaks a kind of fiduciary or at least agency relationship, not a debtor-creditor relationship.[11]

(5) COLLECTION PROCEDURES. The testimony shows that the federal excise taxes which Humble collects from its customers must be placed in separate accounts in depositary banks, that depositary receipts are issued by the Federal Reserve Bank covering such deposits, and that quarterly returns are filed together with such depositary receipts (R. 18a). As noted, the procedure is the same as where an employer withholds payroll taxes from his employees which he then remits to the Internal Revenue Service by placing same in designated depositaries (R. 7a). In both cases the depositor accounts for and remits

[11] Although the bonding requirement was recently deleted by the Excise Tax Reduction Act of 1965, Act of June 21, 1965 § 802, 79 Stat. 136 (1965), 26 U.S.C. §§ 4082(b)(2), 4101, it was in effect during the tax years in question and evidenced Congressional intent concerning the existence of a fiduciary or at least agency relationship.

taxes collected from third parties, in one case from employees and in the other case from purchasers of gasoline.

(6) SPECIAL RULES APPLICABLE TO THE TIME WHEN EXCISE TAX ATTACH. Revenue Ruling 56-361 (1956-2 CUM. BULL. 794) holds that the excise taxes in question attach when title passes. If such taxes were imposed, as the City seems to contend, upon the producer's receipts, there would be no need for a special provision concerning the time when the taxes attach. That such taxes attach when title passes is further evidence of their true nature as sales taxes upon the transfer of goods and not upon the producer's revenue from sales. The Revenue Ruling parallels the Pennsylvania sales and use tax which renders taxable "the acquisition . . . of the ownership, custody or possession of tangible personal property . . . ." Tax Act of 1963 for Education, Act of May 29, 1963, P. L. 49, § 2(e)(1), 72 PURD. PA. STAT. ANN. § 3403-2(e)(1) (Supp. 1966).

(7) INTERSTATE COMMERCE COMMISSION REPORTS. Exhibit P-3 (Annual Report of Motor Carriers to the Interstate Commerce Commission) shows that the Interstate Commerce Commission regards federal gasoline excise taxes as paid by buyers of gasoline. The Annual Report refers on page 43B to costs of "fuel for revenue equipment" (Uniform System of Accounts, category 4250). Then on page 47, such report requires the segregation of "the amount paid to the Federal Government" representing "gasoline,

other fuel and oil taxes" (Uniform System of Accounts, category 5210). This latter category would make no sense were the user of the fuel not in fact the real taxpayer and the producer merely the collection instrumentality (R. 22a).

(8) THE WAGE AND HOUR TEST. An Interpretative Bulletin promulgated by the Department of Labor effective September 3, 1961, deals with the coverage of the Fair Labor Standards Act as applied *inter alia* to gasoline service stations (29 C.F.R. § 779.257-.266 (1967); 1 CCH WAGES AND HOURS ¶ 24,105.257-.266). For purposes of calculating the gross volume of a service station's sales to determine coverage, the Department has held that taxes "imposed at the retail level" shall not be treated as receipts of the "establishment," and that federal excise taxes on gasoline and related products are "taxes imposed at the retail level." Sec. 779.265 of the Bulletin states in material part:

> ". . . the circumstances surrounding the levying and collection of the federal excise tax on gasoline reflect that although they are listed under the title of 'Manufacturers Excise Taxes', they are, in practical operation, taxes 'at the retail level.'"[12]

---

[12] A question was raised at the Tax Review Board hearing why federal gasoline excise taxes are not deductible by consumers, assuming that such taxes are borne at the retail level (R.9a). The answer, as there given, was that I.R.C. Sec. 164 disallows the deduction of "Federal excise . . . taxes . . . (unless) deducted under Section 162 (relating to trade or business expenses)," etc. Presumably there would have been no need to disallow the deduction of such taxes were it not for the fact that they are actually borne at the retail level.

E. *Summary of Humble's arguments in the Pennsylvania Supreme Court.*

The question before the Pennsylvania Supreme Court was whether the Philadelphia Mercantile License tax—which the Pennsylvania courts have held is an especially onerous tax to be scrutinized carefully in its application—should be levied not only on Humble's gross receipts from sales of gasoline, but also on monies that Humble collects from its customers in the form of the federal gasoline excise tax, which is imposed at the rate of 4 cents per gallon of gasoline "sold" and is equal to 26% of the wholesale price of the commodity.

Humble cited a municipal regulation which excluded federal, state and local excise taxes from the City tax base. This regulation expressly provided that exclusion from the City tax base should *not* be limited to certain enumerated taxes, including federal excise taxes levied on jewelry and fur. And since such enumerated taxes were not materially distinguishable from the federal gasoline excise tax, Humble argued that the City could not require inclusion in the City tax base of the gasoline tax while permitting exclusion of the jewelry and fur taxes. The City was forced to concede that the three taxes were not materially distinguishable. The City then sought to repudiate its own regulation (R 10a).

Humble further argued that excise taxes are by nature sales taxes on specific commodities, that as such

they are collectible by sellers from their customers, and that as collected they are not the funds of the seller but are irrevocably committed to the taxing authority. Specifically concerning the federal gasoline excise tax, Humble noted that producers were required to post bond to cover their liability for collections, and that they had to remit monthly the taxes which they collected to the federal government by obtaining depository receipts in the same manner as employers remit federal employment taxes which they withhold and collect from their employees.

In addition, Humble cited provisions of the federal gasoline excise tax statute which exempt certain buyers from the tax, and Humble argued that such exemptions would be meaningless if the tax were not in fact imposed upon buyers. In the same manner, Humble cited other provisions of the federal statute which authorize refunds to certain buyers, and again Humble argued that the refund provisions would be meaningless if in fact the tax were not imposed upon buyers.

Humble noted that both the President and Congress have declared that federal gasoline excise taxes are "assessed to users" for the federal highway construction program, so that they are necessarily taxes which are collected and paid over by producers, not taxes which are borne by producers.

Finally, Humble referred to the Pennsylvania doctrine that state and local taxes should be narrowly construed, that the burden of proving coverage was

on the taxing authority, and that all doubts should be resolved in favor of the taxpayer. Considering the nature of the federal gasoline excise tax as well as the ambiguity of the City's position concerning its own regulation, Humble asserted that the City tax should apply only to the producer's receipts from sales of gasoline and should not apply to the huge federal excise taxes which are superimposed upon transfers of property in gasoline and which the reluctant producer is compelled to collect and remit to the federal government at considerable expense and no gain to himself.

CONCLUSION

For all the foregoing reasons, the City's petition for writ of certiorari should be denied.

Respectfully submitted,

PARK B. DILKS, JR.
Attorney for Respondent
Esso Standard Division of Humble
Oil & Refining Company